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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 JOHN J. AQUINO, CHAPTER 7  
4 TRUSTEE, By Its Assignee,  
5 Convergent Distributors of  
6 Texas, LLC

Plaintiff

v.

21 Civ. 1355 (JSR)  
Bench Trial

8 ALEXANDER CAPITA, LP, JOSEPH  
9 AMATO, ROCCO GUIDICIPIETRO,  
and NESA MANAGEMENT, LLC

Defendants

New York, N.Y.  
June 27, 2023  
10:15 a.m.

Before:

HON. JED S. RAKOFF

District Judge

APPEARANCES

17 LAW OFFICE OF WILLIAM COUDERT RAND  
18 Attorneys for Plaintiff  
19 WILLIAM C. RAND  
GLENN GOODMAN

21 HOLCOMB WARD LLP  
22 Attorneys for Defendants  
23 BRYAN WARD  
HOLLY COLE  
AARON WRIGHT

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(Trial resumed)

THE COURT: Good morning. Please be seated. I am very sorry for the delay which was due, unfortunately, to very heavy traffic coming in. But, let's get the witness on the stand.

Something you wanted to raise?

MR. RAND: Yes. Just some cleanup.

The parties have agreed to stipulate to entering Exhibit 43, so I would move to enter Exhibit 43 into evidence.

THE COURT: Received.

(Plaintiff's Exhibit 43 received in evidence)

MR. RAND: Then we have Mr. Manguso to identify the expenses of Ellis and he is available at 2:00 for -- just to authenticate that document.

THE COURT: OK. So we will interrupt at 2:00 to take him.

MR. RAND: That would be great. Do you need his e-mail to set up the Zoom call or anything?

THE COURT: Well, at the next break, take that up with my law clerk.

MR. RAND: OK. Then we are also going to plan for the other authentication of the other expense documents from Nelson Mullins for tomorrow morning, we are trying to organize that today.

THE COURT: I think, by the way, just because traffic

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1 has become so terrible, instead of starting at 9:30 we will  
2 start at 10:00 on a regular basis because 9:30 is not proving  
3 doable and you guys shouldn't have to sit around twiddling your  
4 thumbs.

5 MR. RAND: That's wonderful. Thank you very much,  
6 your Honor.

7 THE COURT: Yes.

8 MR. WARD: Your Honor, we would ask with respect to  
9 Mr. Manguso, there have been deposition excerpts introduced I  
10 believe by both sides that the parties have stipulated that  
11 those will still be allowable even though he is going to be as  
12 a live witness because he is going to be here solely for  
13 authentication.

14 MR. RAND: I agree.

15 THE COURT: OK. So agreed, yes.

16 MR. WARD: We have one more preliminary matter that  
17 Ms. Cole is going to address with the Court.

18 THE COURT: Yes, ma'am.

19 MS. COLE: Good morning, your Honor.

20 As you might be aware --

21 THE COURT: You are my hero. You are the one who  
22 handles all the deposition issues. These guys are just, you  
23 know, passers by as far as I'm concerned.

24 MS. COLE: Yes, Judge.

25 The parties stipulated to several facts in the

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1 pretrial order filed at Docket 187. We discovered a typo in  
2 one of the stipulations.

3 THE COURT: Oh, I take back everything I said.

4 MR. WRIGHT: It was my fault.

5 MS. COLE: I didn't do it but plaintiffs have not  
6 agreed to withdraw or revise the stipulation. Defendants would  
7 like to withdraw it. It is stipulation no. 39 on page 24.

8 THE COURT: Hang on. So this is in the pretrial  
9 consent order?

10 MS. COLE: Correct; no. 39.

11 THE COURT: 39; I'm sorry, which presently reads:  
12 From the second quarter of 2014 until July 11, 2015, Dr. Mooney  
13 worked as a consultant for ACLP.

14 What do you propose? To correct that?

15 MS. COLE: Your Honor, if you would look back two  
16 pages to stipulation no. 12 you will see that it says: From  
17 June 11, 2015 until March 13, 2016, Patrick Mooney was the CEO  
18 and board member of Inpellis.

19 So, the "July" reference in no. 39 was a typo, it  
20 should have been "June."

21 THE COURT: So you would propose to just substitute  
22 June for July?

23 MS. COLE: Yes, and plaintiff --

24 THE COURT: What is the objection?

25 MR. RAND: The objection is our position is that he

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1 continued to work as a consultant for Alexander after he  
2 started working for Inpellis. They also put him on the  
3 privilege log during that period indicating that his e-mails  
4 were privileged because he was working for Alexander and  
5 communicating with Alexander's lawyer. We objected to that at  
6 the time and then they produced those but it's certainly not  
7 stipulated by us that he did not work for them during that time  
8 period.

9 THE COURT: Well, if the parties can't agree on a  
10 stipulation they can't agree on the stipulation so you simply  
11 want to withdraw the stipulation?

12 MS. COLE: Yes, your Honor.

13 THE COURT: So, any objection to that?

14 MR. RAND: Yes, your Honor. We relied on the  
15 stipulation, we have already had testimony, I think we are  
16 allowed to rely on the stipulated facts.

17 THE COURT: Is Dr. Mooney going to testify?

18 MS. COLE: Yes.

19 THE COURT: All right. Well, let's see what he says  
20 and then we will revisit the issue then. He is not bound by  
21 the stipulation, so we will see what he says.

22 MR. RAND: Thank you, your Honor.

23 MS. COLE: Thank you, your Honor.

24 THE COURT: Please get the witness back on the stand.

25 MR. WARD: May we proceed, your Honor?

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Barrette - Cross

1 THE COURT: Yes.

2 THOMAS L. BARRETTE, resumed.

3 CROSS-EXAMINATION

4 BY MR. WARD:

5 Q. Good morning, Mr. Barrette.

6 A. Good morning.

7 Q. My name is Bryan Ward, counsel for defendants. We have met  
8 previously in your earlier deposition; correct?

9 A. Correct.

10 Q. Are you currently represented by any counsel with respect  
11 to your testimony today?

12 A. No.

13 Q. Are you receiving any compensation related to your  
14 testimony today?

15 A. No, other than my travel expenses have been covered.

16 Q. Have you communicated with Mr. Rand about your testimony  
17 before yesterday?

18 A. Yes.

19 Q. Did he help you prepare for your testimony?

20 A. Yes.

21 Q. How long, in total, did you talk with Mr. Rand about your  
22 testimony?

23 A. I would say over about two days. Two days; I came down  
24 last week and spent a day with him and then we spent Sunday  
25 together this week.

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Barrette - Cross

1 Q. How many hours would that be?

2 A. I would say a total of about 16 hours.

3 Q. Have you communicated with Jan Schlichtmann about your  
4 testimony today?

5 A. Yes.

6 Q. Did he attend those same meetings?

7 A. Yes.

8 Q. Did you talk to him in addition to those meetings with  
9 respect to your testimony?

10 A. Not significantly. Maybe a phone call or two, mostly  
11 arranging logistics for travel.

12 Q. During those conversations did you communicate back and  
13 forth with Mr. Schlichtmann about the facts of the case?

14 A. Yes.

15 Q. I would like to start by getting some clarity as to the  
16 various roles that you have had related to the different  
17 players in this matter. You started working for John Masiz in  
18 May or June of 2014?

19 A. No. The client was BioChemics, not John Masiz  
20 individually.

21 Q. Did you ever work for John Masiz?

22 A. No.

23 Q. So you started work for BioChemics in that time period?

24 A. That's my best recollection.

25 Q. And you worked for BioChemics last July -- June or July of

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Barrette - Cross

1 2014?

2 A. Yes.

3 Q. In July of 2014 you were engaged to work as a lawyer for  
4 Inpellis?

5 A. Yes.

6 Q. From July of 2014 until September 2016 you were solely  
7 employed by Inpellis?

8 A. Just to understand, in the world of BioChemics and Inpellis  
9 and the other players, that's true. I had other clients,  
10 obviously. But, in other words they weren't my -- when I was  
11 at Holland & Knight I had other clients in addition to  
12 Inpellis.

13 Q. But nobody related to any of the people we have been  
14 tacking about during your testimony?

15 MR. RAND: Objection.

16 THE COURT: Sustained.

17 Q. No other entity associated, to your knowledge, with John  
18 Masiz?

19 A. Correct.

20 Q. Not BioChemics?

21 A. Correct. My client, when we took on the IPO in the  
22 mid-summer of 2014, the client became Inpellis.

23 Q. And not Jan Schlichtmann?

24 A. Correct, not Jan Schlichtmann.

25 Q. As part of the work for Inpellis you put together the



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Barrette - Cross

1 initial SeaChange Pharma agreement?

2 A. Yes.

3 Q. But you did not ever formally represent SeaChange as its  
4 lawyer?

5 A. Correct.

6 Q. The purpose of creating SeaChange was an effort to make  
7 Inpellis independent from BioChemics; correct?

8 A. Correct.

9 Q. SeaChange Pharma was the controlling shareholder of  
10 BioChemics?

11 A. Yes. It became the controlling shareholder when the Masiz  
12 family transferred their shares into it.

13 Q. And when was that?

14 A. I believe it was in mid-2014, just sort of summer/early  
15 fall 2014, to the best of my recollection, early in the period  
16 of time that I got involved in this.

17 Q. So, from the summer 2014 throughout the time at issue in  
18 this case SeaChange Pharma was the controlling shareholder of  
19 BioChemics?

20 A. Yes.

21 Q. And throughout that time Jan Schlichtmann was the managing  
22 member of SeaChange Pharma?

23 A. Yes. The technical term is he was the manager of SeaChange  
24 Pharma, which is a little different from being managing member.

25 Q. He was the manager during that time period?

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Barrette - Cross

1 A. Correct.

2 Q. You are aware of the creation of the shareholder resolution  
3 trust in September 2014, correct?

4 A. Yes.

5 Q. You thought it was a good idea?

6 A. Yes.

7 Q. You understood the purpose of the trust was to distance  
8 Inpellis from the problems that BioChemics and John Masiz had  
9 with the SEC?

10 A. Correct.

11 Q. And you believed that BioChemics' handing ownership over to  
12 the trust achieved that separation?

13 A. Yes.

14 Q. The trust was run collectively by three trustees?

15 A. Correct.

16 Q. Jan Schlichtmann was one of the trustees from the trust's  
17 founding through at least 2016?

18 A. I'm sorry. I just didn't quite hear the last part of the  
19 question.

20 Q. Sure.

21 Jan Schlichtmann was one of the trustees from the  
22 trust founding through at least 2016?

23 A. Correct.

24 Q. And then in 2014 and 2015, did you understand that  
25 Mr. Schlichtmann represented Mr. Masiz as his attorney?

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Barrette - Cross

1 A. I honestly didn't know exactly who had formal  
2 representation of whom but I have no reason to think that was  
3 untrue. It just wasn't something I was paying a lot of  
4 attention to specifically.

5 Q. Was it relevant to your work for Inpellis to have some  
6 idea, given the needs for separation from John Masiz and  
7 BioChemics and Inpellis, to know about this relationship  
8 between Jan Schlichtmann and John Masiz?

9 A. No.

10 Q. So you represented Inpellis and as part of that work helped  
11 create SeaChange Pharma in effort to make Inpellis independent  
12 from BioChemics?

13 A. Correct.

14 Q. You didn't work on creating the trust but as Inpellis'  
15 lawyer you thought it was a good idea?

16 A. Correct.

17 Q. And you knew that separating Inpellis and BioChemics was an  
18 important thing for Inpellis?

19 A. Correct.

20 Q. Were you also working to separate Inpellis from the control  
21 of John Masiz?

22 A. Yes.

23 Q. And that was because he was facing securities fraud action  
24 by the SEC?

25 A. Correct.

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Barrette - Cross

1 Q. And that SEC action related to BioChemics as well, correct?

2 A. Correct.

3 Q. John Masiz had previously pleaded no contest to allegations  
4 from the SEC concerning another related company Vaso Active;  
5 correct?

6 A. Correct.

7 Q. So it was very important to separate Mr. Masiz from  
8 Inpellis if the IPO was to go forward?

9 A. Correct.

10 Q. Did you believe that you had in fact achieved the necessary  
11 separation?

12 A. Yes.

13 Q. Starting on January 1, 2015, when the trust received all of  
14 shares of Inpellis, Inpellis began holding itself out as wholly  
15 independent from BioChemics, correct?

16 A. I'm not sure -- I'm not sure I used the words wholly  
17 independent because of the license of the intellectual  
18 property. I mean, they couldn't ignore that, that was a link  
19 to BioChemics. So I'm not sure I would agree with the term  
20 "wholly independent" on that side; as a corporate governance  
21 matter, yes, wholly independent.

22 Q. And independent from Mr. Masiz?

23 A. Yes.

24 Q. This was all between July of 2014 and September of 2016  
25 when you worked exclusively for Inpellis; correct?

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Barrette - Cross

1 A. Correct.

2 Q. During that time frame you also helped create necessary  
3 corporate documents for Montserrat Partners, correct?

4 A. Correct.

5 MR. WARD: Your Honor, may I approach?

6 THE COURT: Yes.

7 Q. I have now handed you what has been previously accepted as  
8 Defendant's Exhibit 51. Is this an e-mail you sent on  
9 September 29, 2014 to Dr. Staskin, Mr. Sterman, Mr. Masiz, and  
10 Mr. Schlichtmann?

11 A. Yes.

12 Q. In it you say I will get you all an LLC agreement from  
13 Montserrat later today; correct?

14 A. Correct.

15 Q. Did you understand these individuals you were corresponding  
16 with were involved with Montserrat?

17 A. Yes.

18 Q. But you never acted as a lawyer for Montserrat, correct?

19 A. Correct.

20 Q. And, to be clear, you understood that creating these  
21 corporate documents of Montserrat was something that you did as  
22 a lawyer for Inpellis?

23 MR. RAND: Objection.

24 THE COURT: Overruled.

25 THE WITNESS: Frankly, at the time I don't think I was

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Barrette - Cross

1 thinking about it. The gentleman with whom I talked regularly  
2 asked me to do it, I knew how to do LLC agreements, and I did  
3 it. We didn't really get into who was representing whom or  
4 whether it was an Inpellis project but it didn't change the  
5 fact that I was representing Inpellis at the time.

6 BY MR. WARD:

7 Q. You were representing Inpellis. So who were you  
8 representing in creating this Montserrat document?

9 A. We didn't think about it at the time. I didn't think about  
10 who I was representing, I was trying to be helpful and get a  
11 document done for that.

12 Q. You are an attorney, you know that when you are doing work  
13 for somebody that it creates an attorney-client relationship;  
14 correct?

15 A. Correct.

16 Q. And so, when you created this Montserrat document, with  
17 whom did you have an attorney-client relationship?

18 A. I didn't think about it at the time.

19 Q. Well, thinking about it now, on whose behalf were you  
20 creating this document?

21 A. I was doing it on behalf of the folks who asked me to do it  
22 which would have been this group of people.

23 Q. So were you their counsel for this matter?

24 A. I didn't view myself as their counsel.

25 Q. But you were doing work as an attorney for these

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Barrette - Cross

1 individuals; correct?

2 A. Yes.

3 Q. But you don't view that as acting as their attorney?

4 A. I wasn't thinking about it that way at the time.

5 Q. How are you thinking about it now?

6 A. The same way.

7 Q. Which is that you were not representing them?

8 A. Correct.

9 Q. You did not consider the work you did in creating the LLC  
10 agreement to be done in your role as representing Inpellis?

11 A. Correct.

12 Q. Do you recall being deposed over two days on November 1 and  
13 2 of 2021?

14 A. Yes, I do.

15 Q. Do you recall giving testimony contrary to what you just  
16 said?

17 A. I may have. I don't remember.

18 MR. WARD: Your Honor, I would ask to approach.

19 THE COURT: Yes.

20 So, here is how we work for deposition items being  
21 offered for impeachment. First, counsel needs to supply a copy  
22 of the deposition transcript to the Court. Second, counsel  
23 should then say I propose to read from page X, lines Y through  
24 Z. Adversary counsel will then have a few seconds to say  
25 whether there is any objection. The most common objection

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Barrette - Cross

1 would be it is not inconsistent. Assuming that objection is  
2 overruled, then you can read the relevant portions of the  
3 deposition transcript. OK?

4 MR. WARD: Thank you, your Honor.

5 (Continued on next page)



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Barrette - Cross

1 MR. WARD: With your permission, I'll give you both  
2 dates of depositions.

3 THE COURT: Just hand it to my law clerk.

4 Page and line.

5 MR. WARD: 321. It's the first day, November 1.

6 THE COURT: Lines?

7 MR. WARD: 3 to 6, your Honor.

8 THE COURT: Any objection?

9 MR. RAND: No objection.

10 THE COURT: You may read.

11 Q. Mr. Barrette, do you recall stating on November 1 of 2021  
12 under oath:

13 "Q. So you consider this to be done pursuant to your role as  
14 representing Inpellis at the time?

15 "A. Yes, correct. Correct."

16 A. I have no doubt that the transcript is accurate, so I said  
17 it.

18 Q. And Monserrat was also run by Mr. Schlichtmann, correct?

19 A. Correct.

20 Q. For clarity, you've never served as lawyer for  
21 Mr. Schlichtmann personally, correct?

22 A. Correct.

23 Q. Other than representing you as an interested third party in  
24 this case earlier, has Mr. Schlichtmann ever represented you?

25 A. No, and I'm not sure what you -- I don't understand the

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Barrette - Cross

1 question.

2 THE COURT: In other words, I think the witness is  
3 objecting to the first part of the question, as I understand  
4 it, so let me put the question to him.

5 Has Mr. Schlichtmann ever represented you in any  
6 capacity?

7 THE WITNESS: No, he has not.

8 Q. To make sure we're clear, your representation of Inpellis  
9 ended sometime in September or October of 2016 when you became  
10 general counsel for the Shareholder Resolution Trust, correct?

11 A. Correct, that's my best recollection.

12 Q. And you served as general counsel for the trust from  
13 October 2016 through sometime in 2018?

14 A. That's right.

15 Q. Turning now to the relationship between Inpellis and  
16 Alexander Capital, on July 29 of 2014, Alexander Capital and  
17 Inpellis entered into an engagement agreement, correct?

18 A. Correct. I don't have the engagement agreement in front of  
19 me. The date sounds right, but they definitely did, yes.

20 Q. You were not part of the meeting leading up to that  
21 agreement, correct?

22 A. Correct.

23 Q. You learned about that after the fact from Mr. Sterman?

24 A. That's right.

25 Q. Other than what Mr. Sterman told you and what appears in

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Barrette - Cross

1 the July 29, 2014 engagement agreement, you have no knowledge  
2 of what was or was not said at that meeting?

3 A. I'm not sure what meeting you're talking about.

4 Q. Any meetings prior to the engagement agreement between  
5 Inpellis and Alexander Capital.

6 MR. RAND: Objection.

7 THE COURT: Yes, I think it's gotten a little  
8 confusing. There was a previous question:

9 "Q. You were not part of the meeting leading up to that  
10 agreement, correct?

11 "A. Correct."

12 So I think that's the meeting he's referring to. It  
13 is certainly not critical. It was not clear from the wording  
14 of the question. So let me repeat then the question that was  
15 somewhat ambiguous but corrected:

16 "Q. Other than what Mr. Sterman told you and what appears in  
17 the July 29, 2014 engagement agreement, you have no knowledge  
18 what was or was not said at that meeting?"

19 And now we know that that meeting is the meeting that  
20 was referred to two questions earlier. Okay? So is the answer  
21 to that question yes, no, or what?

22 THE WITNESS: Yes, I have no knowledge of what  
23 happened at that meeting.

24 THE COURT: Very good.

25 BY MR. WARD:

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Barrette - Cross

1 Q. And you didn't communicate at all with Alexander Capital  
2 before that engagement letter had been sent, correct?

3 A. Correct.

4 Q. Are you reasonably certain that you reviewed the July 29,  
5 2014 engagement agreement before it was signed?

6 A. Yes, I am reasonably certain I did.

7 Q. Is it accurate to say that any company considered -- strike  
8 that.

9 Is it accurate to say that any company considering  
10 going public simply would not proceed unless they had a firm  
11 commitment engagement letter?

12 MR. RAND: Objection. I object to the --

13 THE COURT: I understand. The reason I'm pausing is  
14 normally I would sustain the objection, but it may have been  
15 opened by what this witness volunteered on direct testimony  
16 about the general nature of how companies view this type of  
17 situation.

18 So I think given that prior testimony on direct, the  
19 objection is overruled.

20 A. I think I remember the question.

21 THE COURT: You have a good memory.

22 A. I think you said that any company thinking of a public  
23 offering would only do it as a firm commitment. Was that the  
24 question, counselor?

25 THE COURT: That was the question.

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Barrette - Cross

1 A. Okay. I think it's a little bit broad. When you said "any  
2 company," I can't say what any company in the whole world or  
3 all of the United States might choose to do. It was clear to  
4 me that the transaction contemplated was a firm commitment  
5 public offering, which is -- in my experience, which is just  
6 the cases I've worked on but over many years, that was the only  
7 kind of public offering I had seen companies proceed with was a  
8 firm commitment public offering.

9 Q. Do you recall testifying yesterday that a company in  
10 Alterix's position or any company considering going public  
11 would simply not proceed unless they had a firm commitment  
12 engagement letter because the chances of it succeeding are much  
13 greater in a firm commitment scenario and it therefore makes  
14 sense to deploy all the resources that it would take to conduct  
15 a firm commitment offering?

16 THE COURT: Yes, but I don't view that as inconsistent  
17 because he never held himself out as a formal expert. He was  
18 saying throughout the numerous elaborations that he offered  
19 yesterday that he was talking from his personal experience, and  
20 I think he confirmed just now that from his personal  
21 experience, that's the only kind of arrangement that he was  
22 familiar with any company entering into.

23 I don't think we need to get into quibble whether  
24 there's some conceivable company in the world that would be  
25 otherwise, and I don't think we have to worry about whether he

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Barrette - Cross

1 needs to be qualified as a formal expert or not. But why don't  
2 we proceed.

3 MR. WARD: Thank you, your Honor.

4 BY MR. WARD:

5 Q. You understand that companies can conduct IPOs and other  
6 public offering on a best efforts basis, correct?

7 A. Correct.

8 Q. And you understand that companies can and do list on the  
9 NASDAQ through best efforts underwriting?

10 A. I have no reason to doubt that. I've never done it, and  
11 I'm not familiar with what would be involved in doing best  
12 efforts on the NASDAQ in an initial public offering. That  
13 group of facts is just not familiar to me.

14 Q. Do you understand that Inpellis could have listed on the  
15 NASDAQ through a best efforts underwriting?

16 MR. RAND: Objection. Conditional.

17 THE COURT: Well, is the question is his understanding  
18 of what was legally available to them, or I'm not quite sure  
19 what the question is.

20 MR. WARD: Yes, legally available, practical. Could  
21 it have happened?

22 A. So there are three elements to that question: Legally  
23 available, practical and could have happened. It may have been  
24 legally available. I don't think it was practical, and I don't  
25 think it could have happened. What we're talking about is

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Barrette - Cross

1 listing on NASDAQ. That is what you were asking, I believe,  
2 correct?

3 Q. Yes. Setting aside the issues that led to the demise of  
4 the IPO as a company with undergoing a best efforts  
5 underwriting, that the best efforts underwriting would not have  
6 precluded Inpellis from being listed on the NASDAQ?

7 A. I believe that's correct.

8 Q. You also understand that moving forward with an IPO,  
9 whether it's on a firm commitment or best efforts basis, still  
10 requires hiring an outside auditor, company counsel and  
11 underwriters' counsel, correct?

12 A. Correct.

13 Q. Now I'm going to show you Defendant's Exhibit 1. Do you  
14 recognize this as the engagement agreement signed on July 29,  
15 2014 we were referring to earlier?

16 A. Yes.

17 Q. Did you as counsel for Inpellis understand it to be a  
18 binding contract?

19 A. Yes.

20 Q. Binding on both parties?

21 A. Correct.

22 Q. On page 1, beginning of section one, the engagement  
23 agreement states it is an exclusive engagement agreement,  
24 correct?

25 A. Correct.

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Barrette - Cross

1 Q. Further down the first page, second paragraph under the  
2 Roman Numeral I, engagement agreement says that: "Alexander  
3 Capital shall also be the exclusive financial adviser on all  
4 financing advisory, including M&A during this engagement,"  
5 correct?

6 A. It does say that, yes.

7 Q. Was it your understanding when you reviewed this document  
8 that upon signing, Alexander Capital would become the exclusive  
9 financial adviser for Alterix?

10 A. Yes.

11 Q. When you reviewed this document, it was not your  
12 understanding that Alexander Capital is being Inpellis's  
13 exclusive financial adviser meant that Inpellis was not allowed  
14 to seek financial advice from other financial advisers,  
15 correct?

16 MR. RAND: Objection.

17 THE COURT: Sustained as to form. A question of the  
18 form "it was not your understanding that" is never going to  
19 survive an objection as to form.

20 MR. WARD: Thank you, your Honor.

21 Q. So was it your understanding that Alexander Capital's being  
22 Inpellis's exclusive adviser meant that Inpellis was not  
23 allowed to seek financial advice from other financial advisers?

24 A. Yes.

25 Q. It is it your testimony that it would not be a breach for



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Barrette - Cross

1 Inpellis to seek financial advice -- I'm sorry, let me start  
2 over.

3 Is it your testimony that it would not be a breach for  
4 Inpellis to seek financial advice from entities other than  
5 Alexander Capital?

6 A. I'm sorry, I think you asked if it would not be a breach.

7 Q. I'll restate that. Would it -- is it your testimony that  
8 it would be a breach for Inpellis to seek financial advice from  
9 entities other than Alexander Capital?

10 A. Yes, that's my testimony.

11 Q. Do you recall testifying differently during your  
12 deposition?

13 A. I don't recall, but if you have the transcript, you can  
14 correct me if I'm wrong.

15 Q. I would identify for Court page 338.

16 THE COURT: Lines?

17 MR. WARD: Lines 2 through 8.

18 MR. RAND: No objection.

19 THE COURT: I'm sorry, did you say "no objection"?

20 MR. RAND: Yes.

21 THE COURT: Go ahead. Read it.

22 Q. On November 1 of 2021, the question was asked:

23 "Q. Did you understand that under the terms of the engagement  
24 agreement, it would be a breach of Inpellis to seek or accept  
25 financial advice about the IPO from an underwriter other than

N6RQaqu2

Barrette - Cross

1 Alexander Capital?

2 "A. No, actually, it wouldn't really -- I wouldn't really  
3 understand it quite that way you put it. No."

4 A. Again, the agreement says exclusive. If I said that in my  
5 deposition, I think I was trying to think about maybe some of  
6 the nuances, the differences between seeking financial advice  
7 and financial advice as opposed to maybe seeking another  
8 investor or another underwriter.

9 I think we all know that things evolved after this,  
10 but I'm not disputing what the contract says. And if I did at  
11 the time, I probably should have been more thoughtful in my  
12 response, but I'm not disputing what the contract says.

13 Q. Was it your testimony today that your understanding of the  
14 agreement is that it did not allow Inpellis to talk to other  
15 investment banks even in an attempt to replace Alexander  
16 Capital?

17 THE COURT: Let me -- go ahead, put your answer.

18 A. I think that's a different question.

19 Q. Yes. Would you answer it?

20 A. Yes. If during the course of this the company decided that  
21 it might want to replace Alexander Capital because, for  
22 example, it was not happy with the advice it was getting, I do  
23 think it was free to talk to other investment banks about  
24 replacing Alexander. If it decided it wanted to do that, it  
25 would have to then go to Alexander and see if they would agree

N6RQaqu2

Barrette - Cross

1 to get out of the contract.

2 But there's a difference between actually taking  
3 advice from somebody and talking to somebody about whether they  
4 would want to take on the role of being a financial adviser.  
5 That is, I guess, the distinction I was trying to draw during  
6 the deposition and what I'm trying to say now.

7 THE COURT: Let me ask a different question just for  
8 my clarification.

9 So this agreement Defendant's Exhibit 1, says that  
10 Alexander "will act as agent on a firm commitment basis."

11 And at some point Mr. Mooney learned and then conveyed  
12 to you, as I understand it, and to other members of the board,  
13 that Alexander did not have authority to act on a firm  
14 commitment basis. Do I have that right?

15 THE WITNESS: Correct.

16 THE COURT: So was there any discussion at that  
17 point -- this is I think the meeting which we went through your  
18 notes -- about whether Alexander had breached the agreement and  
19 therefore the agreement was now null and void?

20 THE WITNESS: It's a very good question, your Honor.  
21 Again, at the time the focus was much more on the positive and  
22 getting the deal done. And so I honestly don't remember  
23 whether we said, oh, the engagement letter contract has been  
24 breached and could be void. I just -- again, at the time the  
25 idea was to --

N6RQaqu2

Barrette - Cross

1 THE COURT: All right. Now a different question.  
2 There was discussion at that meeting and at subsequent meetings  
3 about finding a co-underwriter, and there was even some  
4 indication that some underwriting firms had been approached and  
5 turned it down. Do you remember that?

6 THE WITNESS: Oh, yes. Yes, absolutely.

7 THE COURT: So at the time was Alexander aware of  
8 those?

9 THE WITNESS: I think Alexander was setting those  
10 meetings up.

11 THE COURT: All right. What's your basis for saying  
12 that?

13 THE WITNESS: Those notes that you were talking about,  
14 that was a meeting that Mr. Carlin from Alexander was at, and  
15 my recollection is he was the one that was summarizing -- you  
16 recall there was that somewhat detailed set of points from  
17 Margery Fischbein at FBR. My recollection is that that report  
18 came from Mr. Carlin.

19 THE COURT: Go ahead, Counsel.

20 MR. WARD: Thank you, your Honor.

21 BY MR. WARD:

22 Q. Is it your understanding that it would be a technical  
23 breach for other entities to raise funds for Inpellis during  
24 the time of this agreement?

25 A. I think we can quibble about whether that's financial

N6RQaqu2

Barrette - Cross

1 advice or raising funds, but the -- but I take your point that  
2 the exclusivity here for Alexander, you know, could be seen as  
3 making use of somebody else to raise funds a breach of this  
4 agreement.

5 Q. Do you see it that way? Is there any other way to see it?

6 A. I do see it that way. However, I also see that my  
7 experience with these agreements is these provisions are in  
8 here to protect their fees, and if the company went and raised  
9 money from somebody else, the solution is that Alexander would  
10 get paid its fee on that raise, and this is all about  
11 protecting the commissions.

12 Q. And that would be a resolution of a breach of the contract?

13 A. Correct.

14 Q. On January 1, 2015, is it your understanding that Inpellis  
15 and BioChemics became independent entities?

16 A. Yes.

17 Q. That's the date on which BioChemics transferred all of its  
18 shares from Inpellis to the trust, correct?

19 A. That's correct.

20 Q. As of January 1 of 2015, BioChemics had no legal ownership  
21 of Inpellis?

22 A. That is true.

23 Q. And the two were held out as operating independently,  
24 correct?

25 A. Correct.

N6RQaqu2

Barrette - Cross

1 Q. And representations about that independence began to appear  
2 in documents sent to investors and in filings with the SEC?

3 A. True.

4 Q. You believe this was important to the IPO?

5 A. I did.

6 Q. If Inpellis was tied to BioChemics with a big judgment  
7 hanging over BioChemics' head, the IPO would be challenging, to  
8 say the least?

9 MR. RAND: Objection.

10 THE COURT: Well, it's a bit rhetorical. You want to  
11 phrase it a little more neutrally.

12 Q. If Inpellis were tied to BioChemics, that would pose a  
13 challenge to the IPO, correct?

14 A. The terminology "tied to BioChemics" I think is simplistic.  
15 There clearly were links between Inpellis and BioChemics  
16 because of the intellectual property, and that was very fully  
17 disclosed in the registration statement.

18 Inpellis could not completely divorce itself from  
19 BioChemics. The contribution of the shares of the trust, the  
20 recruiting of the board of directors, and the management  
21 committee meant that the governance, the decision-making  
22 control of Inpellis was independent of BioChemics and John  
23 Masiz. So when you say could not ever be tied to BioChemics, I  
24 think that glosses over a more complicated situation.

25 Q. Well, if they were -- if John Masiz still had ties to

N6RQaqu2

Barrette - Cross

1 Inpellis, that would also -- that would make an IPO difficult,  
2 correct?

3 A. The answer is yes, but, again, as the disclosure showed  
4 because John Masiz was involved with the technology of  
5 BioChemics, there was always going to be some connection. The  
6 effort was to show that a truly independent group of people was  
7 now making decisions for Inpellis, including as it related to  
8 the continuing, somewhat complicated relationship with  
9 BioChemics.

10 Q. And early in January of 2015, you began to work with  
11 underwriters' counsel, Alexander Capital's counsel, Greenberg  
12 Traurig to provide due diligence information, correct?

13 A. Correct.

14 Q. And due diligence leading up to an IPO, the company's  
15 counsel, that was you, provides the counsel for the  
16 underwriter, for Alexander Capital, with a bunch of documents,  
17 correct?

18 A. Correct.

19 Q. And the purpose of these is to help the underwriters'  
20 counsel evaluate the company?

21 A. Again, I don't want to quibble on terminology. Evaluate.  
22 I mean, yes, I mean, in plain English yes, it's to -- and it's  
23 also to make sure that the -- as they reviewed the disclosure  
24 in the S-1 that it accurately reflects what's going on in the  
25 company, and the information helps them do that.

N6RQaqu2

Barrette - Cross

1 Q. To make sure that there aren't any issues that may impede a  
2 successful IPO, correct?

3 A. That really is not the role of underwriters' counsel. The  
4 role of underwriters' counsel is to make sure the disclosure is  
5 accurate. And obviously issues that could impede become part  
6 of the discussion.

7 But their role is not to create a successful IPO.  
8 That's the role of the business people and the investment bank,  
9 and the underwriter. The role of the underwriters' counsel and  
10 even company counsel is to provide accurate disclosure, and  
11 that's what they were doing, and that's what we were doing.

12 Q. Part of the purpose here is to make sure that underwriters'  
13 counsel can be alerted to any issues that should be disclosed  
14 on an IPO?

15 A. Correct.

16 Q. I am now going to hand you what has been accepted as  
17 Defendant's Exhibit 56. Mr. Barrette, this is an email from  
18 Mr. Marsico, counsel for the underwriter, to you dated  
19 January 14, 2015, correct?

20 A. Correct, it's also -- there are a number of other  
21 recipients as well.

22 Q. Attached to the email is a legal due diligence request  
23 list, correct?

24 A. Correct.

25 Q. Looking at the list, do you see that underwriters' counsel



N6RQaqu2

Barrette - Cross

1 is asking for a lot of information about BioChemics?

2 A. Correct.

3 Q. Does this indicate to you that Inpellis's relationship to  
4 BioChemics was important to Alexander Capital and its  
5 attorneys?

6 A. Yes.

7 Q. I'm now going to show you what has been accepted as  
8 Defendant's Exhibit 57. Is this is Defendant's Exhibit 57 a  
9 January 29, 2015 email from you to Mr. Masiz?

10 A. Yes.

11 Q. And in this email, you write: Hi John. I need you to  
12 print and sign and PDF to me, correct?

13 A. Yes.

14 Q. There are two attachments, correct?

15 A. You just handed me a one-page copy of the email, not the  
16 attachments.

17 Q. If you look at where it says "attachments"?

18 A. Yes.

19 Q. You see there are two listed?

20 A. Yes.

21 Q. So do you have any reason to believe there were not two  
22 attachments to this --

23 A. No, I did not see the attachments line before. I believe  
24 they were there.

25 Q. So then through this email, you were on January 29, 2015

N6RQaqu2

Barrette - Cross

1 asking Mr. Masiz to sign the two attachments you were sending,  
2 correct?

3 A. Yes.

4 Q. I'm now going to hand you what has been accepted as  
5 Defendant's Exhibit 60. This is one of the two attachments to  
6 the January 29, 2015 email from you to Mr. Masiz. Do you  
7 recognize that?

8 A. I do.

9 Q. On its face, this attachment bears a date of June 5, 2014,  
10 correct?

11 A. Correct.

12 Q. It purports to reflect a resignation by Mr. Masiz from  
13 Alterix on that date, correct?

14 A. Correct.

15 Q. You created this document Defendant's Exhibit 60 in your  
16 capacity as counsel for Inpellis?

17 A. Correct.

18 Q. You did so at the same time that you were responding to due  
19 diligence requests, correct?

20 A. Correct.

21 Q. Did Mr. Masiz sign this document to your knowledge?

22 A. I believe so. I believe so.

23 Q. Once he signed it, you provided it to Alexander Capital as  
24 part of the due diligence file, correct?

25 A. I don't have a clear memory, but I'm sure I did.

N6RQaqu2

Barrette - Cross

1 Q. This was also provided to Alexander Capital's counsel,  
2 correct?

3 A. Correct.

4 Q. It was an important document, right?

5 A. Yes.

6 Q. And it was important because you knew the resignation of  
7 Mr. Masiz would be an issue for the SEC later, correct?

8 A. Correct.

9 Q. And creating separation between Mr. Masiz and Inpellis was  
10 a major goal of the company and the trust?

11 A. Correct.

12 Q. You knew that Alexander Capital would rely on the accuracy  
13 of these documents, correct?

14 A. Correct.

15 Q. And you knew that these documents were inaccurate, right?

16 A. No, I don't agree with that statement.

17 Q. You knew that to the extent that this document was  
18 purporting to be from the dates it was signed, that it was  
19 inaccurate, correct?

20 A. Incorrect.

21 Q. Do you recall testifying differently during your  
22 deposition --

23 A. I don't recall, but I'm sure you have the transcript.

24 MR. WARD: Your Honor, I would like to introduce page  
25 480 of Mr. Barrette's November 2 deposition, lines 14 to 17.

N6RQaqu2

Barrette - Cross

1 MR. RAND: No objection, your Honor.

2 THE COURT: I'm sorry?

3 MR. RAND: No objection.

4 THE COURT: Okay. Go ahead.

5 MR. RAND: Do you need me to say that or should I just  
6 say nothing?

7 THE COURT: No. No. I do need you to say that.

8 Thank you very much.

9 Q. Mr. Barrette, on November 2, 2021, you testified under oath  
10 as follows:

11 "Q. And to the extent they were purporting to be from the dates  
12 they were signed, they were inaccurate, correct?

13 "A. Correct."

14 A. I can only say I'm not sure I necessarily understood the  
15 question at the time. These were normal cleanup things that  
16 are done in preparation for an IPO.

17 My best recollection is that we knew that Mr. Masiz  
18 had resigned in June. No one could find a copy of it, so we  
19 created a new one. It was routine.

20 THE COURT: Well, when you say routine, you're saying  
21 it was backdated.

22 THE WITNESS: I can't disagree with that in the  
23 literal situation, your Honor.

24 THE COURT: And isn't the routine way of indicating a  
25 backdating to say "as of" so that anyone looking at the

N6RQaqu2

Barrette - Cross

1 document knows that while it's being signed later, it refers  
2 back. Isn't that the normal way to do that?

3 THE WITNESS: Totally fair point, your Honor. In  
4 hindsight, we probably should have done it that way, but that's  
5 not what we chose to do.

6 THE COURT: Go ahead, counsel.

7 BY MR. WARD:

8 Q. So without that designation, these were inaccurate,  
9 correct -- this is an inaccurate document?

10 A. I don't like to acknowledge inaccurate. I think it creates  
11 a negative impression of the work we're doing that I don't  
12 agree with.

13 Q. Well, it may create a negative impression, but are you  
14 saying that's false; this was an accurate document?

15 THE COURT: Well, I think I understand the situation.  
16 I think we might need to move on. The reason I say that is,  
17 unfortunately, given my very late arrival this morning, I have  
18 an 11:15, 15-minute telephone conference in another matter that  
19 I've got to take. So why don't we go about five more minutes  
20 now, but then we'll take a 15-minute break.

21 MR. WARD: Thank you, your Honor. Yes.

22 BY MR. WARD:

23 Q. When Inpellis was providing due diligence to other  
24 potential underwriters, you provided this document to them as  
25 well?

N6RQaqu2

Barrette - Cross

1 A. Correct.

2 Q. You never told Alexander Capital or any other investment  
3 bank that the document had been backdated?

4 A. Correct. As far as I can remember, and I should say, by  
5 the way, just to clar -- purely clarification, I'm not sure we  
6 did a full-blown due diligence list with another underwriter.  
7 I'm just not sure how important that is, but if we had or  
8 somebody got even partial due diligence, we would have had that  
9 in there, so, so be it.

10 THE COURT: I guess a different kind of question. Did  
11 Mr. Masiz continue to exercise any role as an officer or  
12 director of Alterix after June 5, 2014?

13 THE WITNESS: Not to my recollection. I would also, I  
14 guess, point out that if this was signed in January, you know,  
15 that was right at the time that the ownership of Inpellis was  
16 moved to the trust in the real effort to make it independent  
17 happen, so...

18 THE COURT: All right.

19 BY MR. WARD:

20 Q. Mr. Barrette, was it accurate that he was still consulting  
21 to Inpellis?

22 A. The -- I honestly don't have a clear memory, but I think  
23 likely he was; that people were still talking to him.

24 MR. RAND: I'd like to object to the question as  
25 assuming facts not in evidence. I apologize.

N6RQaqu2

Barrette - Cross

1 THE COURT: No. Overruled.

2 Q. I've just handed you what has been admitted as Defendant's  
3 Exhibit 58. This is the second of the two attachments to your  
4 email of January 29, 2015, correct?

5 A. Correct.

6 Q. This is a document bearing on its face the day of the  
7 November 30, 2012, correct?

8 A. Correct.

9 Q. And this document says it is an action of the sole director  
10 of Alterix, correct?

11 A. Yes.

12 Q. And you are the author of this document, correct?

13 A. Yes.

14 Q. In November of 2012, the purported date of the document,  
15 you had not heard of Alterix, correct?

16 A. Correct.

17 Q. You didn't start working for it until 2014?

18 A. That is true.

19 Q. In January of 2015, when you asked Mr. Masiz to sign it,  
20 Mr. Masiz had no role at Alterix, correct?

21 A. That is true.

22 Q. You wrote this in your capacity as counsel for Inpellis?

23 A. I did.

24 Q. This document purports to authorize Alterix to enter into  
25 an IP licensing agreement with BioChemics, correct?

N6RQaqu2

Barrette - Cross

1 A. Correct.

2 Q. In 2015, the only thing of substantial value that Alterix  
3 owned was its alleged right to use the BioChemics IP, correct?

4 A. That is true.

5 Q. This was something you created for Mr. Masiz to sign in  
6 2015?

7 A. True.

8 Q. Mr. Masiz signed it?

9 A. Yes, to the best -- this isn't signed, but I believe that  
10 he did, yes.

11 Q. Once he signed it, you provided it to Alexander Capital as  
12 part of its due diligence file?

13 A. I did.

14 Q. This was provided to Alexander Capital's counsel?

15 A. It was.

16 Q. This is also an important document, correct?

17 A. Very important.

18 Q. Because the BioChemics license is a key asset of Inpellis?

19 A. True.

20 Q. Essentially, its whole value is in this asset, correct?

21 A. Yes.

22 Q. You knew that Alexander Capital would rely on the accuracy  
23 of these documents, correct?

24 A. Correct.

25 Q. And you knew that these documents had been backdated,



N6RQaqu2

Barrette - Cross

1 correct?

2 A. Correct.

3 Q. Later, when Inpellis was providing due diligence to other  
4 potential underwriters, you provided this to them as well,  
5 correct?

6 A. Again, I just want to be accurate. I'm not sure we ever  
7 went through this kind of rigorous diligence process with  
8 another underwriter, but if they had, we would have done it, so  
9 I'm not sure that that distinction makes much difference.

10 Q. And you never told Alexander Capital or any other  
11 investment bank that this document was inaccurate, did you?

12 A. I did not.

13 Q. You never informed them as to the backdating, correct?

14 A. Correct.

15 THE COURT: Okay. So now I do have to take that  
16 break, and we will resume in 15 minutes.

17 MR. WARD: Thank you, your Honor.

18 (Recess)

19 THE COURT: All right, counsel.

20 MR. WARD: Thank you, your Honor.

21 BY MR. WARD:

22 Q. Mr. Barrette, just reorienting you back to Defendant's  
23 Exhibit 58.

24 A. Yes, I have it.

25 Q. And it's your testimony that this was a document that was

N6RQaqu2

Barrette - Cross

1 backdated over two years by Mr. Masiz authorizing the IP  
2 license that was the most important asset of Inpellis, correct?

3 A. Correct.

4 Q. And at the time that Mr. Masiz signed this, he had no  
5 authority to act on behalf of Inpellis, correct?

6 A. Correct.

7 Q. As of January 29, 2015, when you sent the email, if  
8 Inpellis had proper authorization to enter into a November 30,  
9 2012 intellectual property license with BioChemics, the  
10 authentic documentation of that had been lost, correct?

11 A. Correct.

12 Q. That's why you created this authorization?

13 A. Correct.

14 Q. I just want to go back quickly over some testimony you had  
15 given just to make sure we're clear on the record.

16 With respect to Mr. Carlin's role, were you testifying  
17 that Mr. Carlin was at the September 10, 2015 meeting?

18 A. No. There was another set of notes from a meeting that was  
19 Mr. Carlin, me and Pat Mooney where Mr. Carlin went through  
20 information regarding talking to investors, including Margery  
21 Fischbein at FBR.

22 Q. Mr. Carlin was never speaking directly to the board of  
23 Inpellis, correct, to your knowledge?

24 A. To my knowledge, no. I believe the September 10 meeting  
25 was with the trust, not with the board, but I would defer to

N6RQaqu2

Barrette - Cross

1 what the record shows.

2 Q. But Jack Clarke was attending, he was the chairman of the  
3 board of Inpellis, correct?

4 A. Correct.

5 Q. One other thing I just wanted to go over quickly, is you  
6 mentioned with respect to a breach of the under -- the breach  
7 of the engagement agreement, that it was your testimony that  
8 the underwriter --

9 THE COURT: I'm sorry. Forgive me, counsel.

10 When you say that the original documentation of these  
11 documents that were -- of the underlying events of these  
12 documents that were later backdated was lost, how do you know  
13 that?

14 THE WITNESS: Because there -- I was told the  
15 license -- there were other documents that predated by a couple  
16 of years my involvement about the license, and so I was very  
17 comfortable that the license had existed. There were -- there  
18 may have even been, and I want to be clear, I couldn't give you  
19 chapter and verse, a copy of the license from the time that had  
20 not been signed, but I was very comfortable the license was  
21 done in whatever date is on the one that -- the backdated one.

22 THE COURT: Who was preparing the relevant documents  
23 at that time, that earlier time?

24 THE WITNESS: Your Honor, I honestly don't know.  
25 Mr. Masiz was running the company. He had -- I believe had

N6RQaqu2

Barrette - Cross

1 other lawyers advising him at the time, not me. I know he had  
2 very competent intellectual property counsel. They might have  
3 done it. I just don't know who did it, but I can tell by the  
4 way it was done, that it was advice of a lawyer.

5 THE COURT: Who told you that the documents had been  
6 lost?

7 THE WITNESS: Again, I don't have a clear memory, but  
8 it very likely could have been Mr. Masiz.

9 THE COURT: Go ahead, counsel.

10 MR. WARD: Thank you, your Honor.

11 BY MR. WARD:

12 Q. Mr. Barrette, your testimony is that Mr. Masiz had very  
13 competence intellectual property attorneys handling that at the  
14 time in 2012?

15 A. Yes, that's my best memory. As I was getting to know the  
16 company, I have a memory of observing that, yes.

17 Q. But that firm lost the agreement?

18 A. I don't know who lost the agreement. I just don't know if  
19 the firm lost it.

20 Q. The firm didn't retain it?

21 A. Again, I'm not sure I even asked the firm. I'm not even  
22 sure what firm it was. And I don't -- I just don't recall who  
23 I asked for a signed copy of it. I assume I did, but I just  
24 don't recall.

25 Q. You don't recall the firm that it was, but you know they

N6RQaqu2

Barrette - Cross

1 were very competent?

2 A. I just don't recall the name right off the top of my head.  
3 There were a couple of firms involved for the intellectual  
4 property of the company. I'm sure there's plenty of  
5 information about that in documents that are available. One of  
6 them was a small firm. I happen to remember it was in  
7 Westborough, Massachusetts, because that's where I went to high  
8 school. Another was a larger Boston firm. I'm sorry the name  
9 of is escaping me. It's a well-known intellectual property  
10 boutique in Boston.

11 Q. Neither of the documents that were attached to the January  
12 29, 2015 email that you sent ever indicated they had been  
13 backdated?

14 A. Correct.

15 Q. I would now like to hand you what has been admitted as  
16 Defendant's Exhibit 7. Mr. Barrette, up to now, the two  
17 attachments we've been talking about that were backdated were a  
18 purported authorization for Inpellis to license the  
19 intellectual property, correct? That was one of the two,  
20 correct?

21 A. Correct.

22 Q. And the other document was a purported resignation of  
23 Mr. Masiz, correct?

24 A. Correct.

25 Q. And what I've handed you -- well, would you tell me what

N6RQaqu2

Barrette - Cross

1 this is.

2 A. It is a document -- the license agreement dated  
3 November 30, 2012.

4 Q. Do you recall testifying that you couldn't remember why you  
5 created this document in 2014, but that you assumed it was also  
6 to clean up the record?

7 A. I do recall testifying to that, yes.

8 Q. And your testimony was that you knew there was a license in  
9 place on November 30 of 2012?

10 A. If I testified to that, I did, and that was my  
11 understanding at the time, yes.

12 Q. Is that still your understanding?

13 A. Yes.

14 Q. You assumed that this document was in the BioChemics files?

15 A. Correct.

16 Q. And that there was a copy in your electronic files?

17 A. A copy of which document in my electronic files are you  
18 talking about? I'm not clear.

19 Q. The document that we're looking at here, this was also  
20 backdated, correct?

21 A. Correct.

22 THE COURT: And here we have on page 25, Mr. Masiz  
23 signing twice, if I understand it, purportedly signing on  
24 November 30, 2012 even though the first sentence on page 1 of  
25 the license agreement says that it's entered into as of, so he

N6RQaqu2

Barrette - Cross

1 could have signed it, truthfully, on a later date and still  
2 made it retroactive, but instead he chose at your behest to  
3 lie. Do I have that right?

4 THE WITNESS: Well, obviously, your Honor, I am not  
5 crazy about the term "lie" only in the sense --

6 THE COURT: I had a feeling you might not be.

7 THE WITNESS: It was -- as I said, I viewed it as -- I  
8 want to be very clear. I was very comfortable from looking at  
9 things and talking to people that there was a license agreement  
10 in November 2012.

11 If I could have been a little bit better about, you  
12 know, saying these were "as of" documents, I will own that, but  
13 there was no effort to mislead anybody or lie here. It was  
14 just to clean up the record, and I see what you're saying. And  
15 actually I hate the practice of putting dates under signatures  
16 because it leads to the kind of thing that's happening right  
17 now, which is if you have a date on the front and then you date  
18 the signatures, you're always debating, well, what is the date  
19 of this agreement? And it probably should have said "as of"  
20 the at the end.

21 I'm not saying -- it probably could have been handled  
22 better, but the intentions were quite pure to just have a clean  
23 and neat record. And so, you know, I own it. I did these  
24 documents, but I just want to be very clear. I was 100 percent  
25 comfortable that that license did exist in November 2012.

N6RQaqu2

Barrette - Cross

1 THE COURT: All right. Go ahead, counsel.

2 MR. WARD: Thank you, your Honor.

3 BY MR. WARD:

4 Q. When you say your intention was pure to have a clean  
5 record, that was a clean record that would evade scrutiny from  
6 anybody looking at it, right? They would not know that this  
7 had been backdated, correct?

8 A. Correct, but my intention was not to evade scrutiny.

9 Q. And you were an attorney at the time, correct, and  
10 practiced in this area?

11 A. Correct.

12 Q. And this document was created -- this wasn't a matter of  
13 the date having passed by a couple days or something. This is  
14 years later this is backdated?

15 A. That is true.

16 Q. And it was signed by somebody who when he signed it had no  
17 authority to act on behalf of Inpellis, correct?

18 A. Correct.

19 Q. So at the time that this was signed by Mr. Masiz, he had no  
20 ability to cure the lack of an agreement, correct?

21 MR. RAND: Objection.

22 A. Correct.

23 THE COURT: Sustained.

24 Q. Is it your understanding that the backdating of the  
25 intellectual property license by John Masiz after he was no



N6RQaqu2

Barrette - Cross

1 longer part of the company was not a material piece of  
2 information for Greenberg Traurig to know?

3 A. That was my understanding.

4 Q. Is that your understanding sitting here today?

5 A. Yes.

6 Q. After the engagement agreement between Inpellis and  
7 Alexander Capital was signed, Inpellis started to prepare for  
8 the next steps towards an IPO, correct?

9 A. Correct.

10 Q. Do you recall who was engaged in these efforts?

11 A. Yes. I talked about this a little bit yesterday, but happy  
12 to recap it. The --

13 Q. I'm just asking for names at this point.

14 A. Okay. Sorry. In terms of names, in terms of the outside  
15 professionals, there was me and my team at Holland & Knight.  
16 There was Tony Marsico and his team at Greenberg Traurig.  
17 There were the people from Alexander, primarily Chris Carlin.  
18 There was -- there was the team that we were putting together  
19 at the company at that point, Harry McCoy and David Staskin.  
20 Also involved at the time with a lot of interest in it were the  
21 trustees of the trust, especially Mr. Schlichtmann -- Jan  
22 Schlichtmann and Dan Glosband. And we did bring in a gentleman  
23 named Frank Manguso to be CFO. I forget exactly he came in,  
24 but it would have been early in the process. And I'm sure  
25 there's probably an employment agreement in the record

N6RQaqu2

Barrette - Cross

1       somewhere.

2       Q.   I think there might be a miscommunication.   I'm actually  
3       referring to the -- my question may not have been clear.

4               Immediately after the engagement agreement was signed  
5       in July of 2014, was Marshall Sterman involved in raising --

6       A.   I'm sorry.   I was just trying to -- Marshal is the person  
7       who introduced me to this whole, you know, opportunity.   And I  
8       was -- when I hesitated, I was trying to remember because I  
9       knew there was one other important name, and that was it.  
10       Marshall Sterman was an important player.   And, yes, in the  
11       midsummer 2014 timeframe when the engagement letter was signed,  
12       Marshall was very active.

13       Q.   Because there were some things for Alexander -- sorry --  
14       things for Inpellis to do in order to sort of get ready to  
15       start moving towards deliberate steps towards an IPO, correct?

16       A.   That is correct.

17       Q.   Would that include Russ Brown in these efforts?

18       A.   Yes, Russ was involved but to my recollection, but not  
19       extensively.

20       Q.   Jan Schlichtmann you testified was involved --

21       A.   Yes.

22       Q.   -- in this time period as well?

23       A.   Yes.

24       Q.   And you also were?

25       A.   Yes.

N6RQaqu2

Barrette - Cross

1 Q. Was John Masiz?

2 A. Yes, he was very knowledgeable about the technology, so he  
3 was certainly in on conversations.

4 Q. Dr. Staskin?

5 A. Yes. As well. He was, I believe, a practicing doctor at  
6 the time, but, you know, he was definitely involved.

7 Q. So from September through December of 2014, were those  
8 individuals actively seeking to raise capital for Inpellis?

9 A. I actually -- I don't have a great recollection. I'm not  
10 saying that they weren't. They probably were looking for  
11 working capital because, as we said yesterday, Alterix did not  
12 have its own money. And, again, I don't recall being deeply  
13 involved in those efforts. I might have been, but my  
14 recollection is a lot of the time a lot of the effort that was  
15 going on then was working on getting the management team  
16 together, but I'm not -- they very likely were looking for  
17 capital.

18 (Continued on next page)

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N6R5aqu3

Barrette - Cross

1 BY MR. WARD:

2 Q. Mr. Barrette, I will direct you back to Defendant's Exhibit  
3 51, that was the first exhibit that I handed you.

4 A. I have it.

5 Q. This is an e-mail that you sent about the Montserrat LLC  
6 documents; correct?

7 A. Correct.

8 Q. You are replying to an e-mail chain that was forwarded to  
9 you earlier, September 29 of 2014 at 8:25 a.m. from  
10 Dr. Staskin; correct?

11 A. I'm sorry. You said an e-mail from Dr. Staskin? Yes.

12 Q. And copied on the e-mail that he forwarded, Dr. Staskin  
13 forwarded were Mr. Sterman, Mr. Masiz, and Mr. Schlichtmann,  
14 correct?

15 A. Correct.

16 Q. And along with Dr. Staskin and Mr. Brown, this would be the  
17 Alterix team you were referring to that was raising money at  
18 this time?

19 A. Correct.

20 Q. And at this time, September 29, 2014, you were working for  
21 Inpellis but not BioChemics; right?

22 A. Correct.

23 Q. Do you see at the bottom of page 1 Dr. Staskin is  
24 forwarding an e-mail from Dr. Gary Kay; correct?

25 A. Correct.

N6R5aqu3

Barrette - Cross

1 Q. And in it Dr. Kay is saying he will head to the bank that  
2 day and ask for documents related to Montserrat; right?

3 A. Correct.

4 Q. And page 2 we see the e-mail that Dr. Kay was just  
5 referring to, right?

6 A. Yes.

7 Q. And that's an e-mail from Dr. Staskin with wire  
8 instructions for Montserrat Partners; correct?

9 A. Yes.

10 Q. At the bottom of the page we see a previous e-mail from  
11 Dr. Staskin saying he has details for the wire transfer and  
12 update on the deal; correct?

13 A. Yes.

14 Q. As of September 29, 2014, the date you received this, were  
15 you working on any other IPO related to BioChemics?

16 A. No.

17 Q. Or Mr. Masiz?

18 A. I was not.

19 Q. Anything, any IPO related to Mr. Schlichtmann?

20 A. No.

21 Q. On the very bottom of page 2 you see 50,000 and equal sign;  
22 do you see that?

23 A. Yes.

24 Q. Turning to page 3 of Exhibit 51 we see terms of a deal  
25 related to a \$50,000 investment; correct?

N6R5aqu3

Barrette - Cross

1 A. Yes.

2 Q. Those details include 20,000 options; 10 at .8 and 10 at  
3 1.0 of IPO price. Do you see that? It is the large formatted  
4 letters in the large font in the middle of the page.

5 A. I'm sorry. Was there a question?

6 Q. Yes.

7 A. I'm sorry, I didn't understand that.

8 Q. Do you see where it is referring to 20,000 options; 10 at  
9 .8 and 10 at 1.0 of the IPO price?

10 A. I do see that.

11 Q. And to your understanding would that mean 10,000 options to  
12 buy a share of stock at 80 percent of the IPO price and 10,000  
13 options to buy a share of stock at a hundred percent of the IPO  
14 price?

15 A. Yes.

16 Q. Since this is sent to you as counsel for Inpellis and  
17 Inpellis is the only IPO you are working on related to this  
18 group of people at the time, is it fair to say these are  
19 warrants for shares for Inpellis?

20 A. That would be my conclusion; yes.

21 Q. And the details go on to say that when bridge money exceeds  
22 2 million, Dr. Kay can get his money back for entering into the  
23 bridge lending.

24 A. Well, it says you can get money back or enter bridge to  
25 IPO.

N6R5aqu3

Barrette - Cross

1 Q. OK. And do you not understand "enter bridge to IPO" to be  
2 entering into the bridge lending that is being done?

3 A. Yes.

4 Q. And entering into the bridge lending would mean that 75,000  
5 becomes 100,000 and then 20,000 more options; correct? Do you  
6 see that?

7 A. Yes. I see where it says that, yes.

8 Q. So, to your understanding, was Dr. Staskin offering Dr. Kay  
9 a chance to invest in Inpellis now with the guarantee that he  
10 will be allowed to invest in the bridge lending round, if he  
11 chooses?

12 A. That is the way I would read these words, yes.

13 Q. And the terms of the bridge lending appear to be set at  
14 that point, correct?

15 A. So, again, I think the way term sheets work, it looks like  
16 Dr. Staskin was proposing the terms and later it looked like  
17 Dr. Kay thought they were good terms. But, a term sheet is not  
18 a contract so whether they were set or not is not discernible  
19 from this document but this certainly has very specific terms.

20 Q. The terms that he is being offered are including 25 percent  
21 discount on the money invested; correct?

22 A. I'm just checking again. Yes, that seems to be what he is  
23 trying to say, yes.

24 Q. So Dr. Kay only needed to pay 75,000 to be credited with a  
25 hundred thousand investment along with options; correct?

N6R5aqu3

Barrette - Cross

1 A. So, give me a minute to read it because I know what the  
2 large type, which I think was written by Dr. Staskin says. I  
3 just want to see whether the term sheet says the same thing.

4 So, again, this attachment to this e-mail does seem to  
5 say -- that 50,000 note for 75,000, I think the best  
6 interpretation of that is, yes, you invest \$50,000 you get a  
7 note back that has a face amount of \$75,000. That seems to be  
8 what is trying to be conveyed. The smaller text says type of  
9 security, each unit will consist of a convertible note in the  
10 face amount of 75,000 in warrants. It doesn't -- that section  
11 doesn't talk about the discount so it's inconsistent.

12 Q. Then the 75,000 that you mentioned with the bridge lending  
13 would turn into 100,000 so that 50,000 would turn into a  
14 hundred thousand if the investor stuck around until the IPO;  
15 correct?

16 A. That's what this e-mail from Dr. Staskin is proposing to  
17 the investor as far as I can read it. It is not very precise,  
18 it just says 75,000 becomes 100,00, it doesn't even have a  
19 dollar sign. So it is not the way I would have written it as a  
20 lawyer. It is a little vague.

21 Q. This seems to be written by somebody who is not experienced  
22 in the area, would you say?

23 A. I would agree with that; yes.

24 Q. And Dr. Staskin also says that part of these terms include  
25 a total of -- is it 40,000 warrants? 20,000 plus 20,000?



N6R5aqu3

Barrette - Cross

1 A. Well, again, there is a term sheet attached that looks more  
2 professionally done and then there is his summary of it, and  
3 it -- you know, taking it from the top of the third page it  
4 says: Note for 75,000, and 20,000 options; 10,000 at .8 and  
5 10,000 at 1.0. So, that would imply the total number of  
6 options is 20,000. Down below it talked about warrants which  
7 are very much like an option, each will include a warrant to  
8 purchase 10,000 shares of the common stock so those warrant  
9 terms seem to be different from the options that he has above  
10 and I am not sure which was the definitive one.

11 Q. The difference between an option or a warrant, or a prime  
12 difference, is the warrant is issued by the company itself;  
13 correct?

14 A. It doesn't have to be, as I understand the term. They're  
15 both technical terms but not definitive terms of art, so -- but  
16 it could be.

17 Q. Are you aware of any time of the issuance of warrants by a  
18 third-party?

19 A. So, I'm just one person who has done this for a long time.  
20 I would agree that when you use the term "warrant," the working  
21 assumption is that it will be issued by the company and I think  
22 any time I have done warrants -- and I have done a lot of  
23 warrants -- they have been issued by the company.

24 Q. And in this case the company would be Inpellis; correct?

25 A. The way I read this amalgamation of somewhat truncated

N6R5aqu3

Barrette - Cross

1 terms written by Dr. Staskin is, yes, it was intended to be  
2 Inpellis.

3 Q. We saw wire instructions for the money -- for the  
4 investment to be sent to Montserrat; that's correct?

5 A. Correct.

6 Q. One of the ways the team of people you referred to before,  
7 including you and Jan Schlichtmann at the time were raising  
8 capital for Alterix, was by soliciting investment through  
9 Montserrat; is that correct?

10 A. A couple of things. I was not raising money for the  
11 company, that's not what the lawyer does, but I was absolutely  
12 facilitating it by doing documents and things like that. I  
13 want to be clear about that, that I did not solicit funds for  
14 Inpellis. That's not my job and not what I do.

15 Q. You facilitated it; correct?

16 A. I facilitated it by talking about terms with people,  
17 writing a term sheet, writing documents. I absolutely was  
18 involved, I'm not denying that, but I don't think it is  
19 accurate to say that I was soliciting funds which is what you  
20 just said. I was not soliciting.

21 Q. You were facilitating the solicitation of funds --

22 A. Correct.

23 Q. -- for Inpellis; correct?

24 A. Correct.

25 Q. And this is during the time that Inpellis had an engagement

N6R5aqu3

Barrette - Cross

1 agreement with Alexander Capital to be exclusive underwriter,  
2 correct?

3 A. It is exclusive underwriter for the IPO, correct, and it is  
4 exclusive advisor for financings.

5 Q. And, to your knowledge, was this ever raised to the  
6 attention of Alexander Cap?

7 A. I don't know whether it was or not.

8 Q. You don't have any recollection of this being raised to the  
9 attention of Alexander Capital, correct?

10 A. Correct.

11 Q. I'm now going to hand you what has been previously admitted  
12 as Defendant's Exhibit 137. Have you seen this document  
13 before, Mr. Barrette?

14 A. I don't think I have.

15 Q. I will represent to you this is a document produced by Jan  
16 Schlichtmann which he represented was his own record-keeping of  
17 investors in Montserrat. Is that consistent with your  
18 understanding of what this might be?

19 MR. RAND: Objection.

20 A. Yes. I'm sorry.

21 THE COURT: I'm sorry. Was this already received in  
22 evidence?

23 MR. RAND: Yes, it is in evidence.

24 THE COURT: By agreement.

25 MR. RAND: By agreement.

N6R5aqu3

Barrette - Cross

1 THE COURT: So what do the parties agree it is?  
2 Because this witness has never seen it before.

3 MR. WARD: At this point I would have it for -- well,  
4 it has been entered into evidence and I wanted to ask some  
5 questions about this and --

6 THE COURT: No, no, no. I need to know because I'm  
7 going to rule it out of evidence in a nanosecond unless you  
8 jointly tell me what this is as opposed to representations of  
9 counsel in asking questions which are impermissible.

10 MR. WARD: Your Honor, this was --

11 THE COURT: So, since the parties agreed on its  
12 admission they must have agreed to what this is so let me ask  
13 plaintiff's counsel for example. What is this?

14 MR. RAND: I believe it's the summary prepared by  
15 Mr. Schlichtmann of the activity at Montserrat Partners.

16 THE COURT: OK. So is Mr. Schlichtmann going to be  
17 testifying?

18 MR. RAND: They have asked him to testify and he has  
19 agreed to come and testify.

20 MR. WARD: Your Honor, if this hadn't already been  
21 admitted we would be doing this for reference only. He is not  
22 going to testify as to the accuracy of this --

23 THE COURT: I will continue to receive it subject to  
24 connection when Mr. Schlichtmann testifies.

25 MR. WARD: Thank you, your Honor.

N6R5aqu3

Barrette - Cross

1 MR. RAND: Just to be clear, your Honor, we weren't  
2 objecting to it being in evidence, I was just objecting to the  
3 question to the witness about the document.

4 THE COURT: Oh, I understand. That's separate. But I  
5 was objecting to its being in evidence --

6 MR. RAND: OK.

7 THE COURT: -- because, on its face, you don't know  
8 what it is. As I understand it now it is not actually a  
9 business record, it is someone's memory of what they believe  
10 occurred in terms of certain transactions and activity which  
11 may or may not be based on adequate personal knowledge; we will  
12 find out when Mr. Schlichtmann testifies.

13 So, let's go back and put another question.

14 MR. WARD: Yes, your Honor.

15 BY MR. WARD:

16 Q. Mr. Barrette, do you recall all of the investments that  
17 were made into Montserrat?

18 A. No. I was not really involved at all in Montserrat's  
19 fundraising other than drafting the LLC agreement.

20 Q. Could your recollection be refreshed by a document?

21 A. I'm happy to have you show me a document to refresh, sure.

22 MR. WARD: Your Honor, I would just show this to  
23 refresh his recollection at this point.

24 THE COURT: OK.

25 Q. Mr. Barrette, do you, in looking over this document, does

N6R5aqu3

Barrette - Cross

1 this refresh your recollection as to any of the investors and  
2 amounts of investment made into Montserrat Partners?

3 A. Again, no. I actually -- my recollection is I was aware of  
4 Montserrat, I was aware that I drafted the LLC agreement  
5 because some of the folks were using Montserrat as a vehicle to  
6 raise working capital. My understanding was it was actually  
7 for BioChemics but my recollection today is that the Montserrat  
8 effort was not something that I was asked about or involved in  
9 much at all.

10 Q. I'm sorry. You said you weren't involved at all in it?

11 A. Other than drafting the LLC agreement I don't have a memory  
12 of regular meetings or people talking to me about when money  
13 had come in or that sort of thing. I don't remember being  
14 involved in Montserrat.

15 Q. I'm now going to show you what has been admitted into  
16 evidence as Defendant's Exhibit 48. Mr. Barrette, this is an  
17 e-mail chain with Dr. Staskin dated January 19, 2022 after the  
18 end of depositions. Have you seen this document before?

19 A. I'm sorry. When you bumped your microphone I didn't hear  
20 the beginning of the question. I apologize. Could you just  
21 ask it again?

22 Q. This was an e-mail chain that Dr. Staskin produced after  
23 the end of depositions in this matter. Have you seen this  
24 document before?

25 A. OK. So this has a number of pages, just give me a minute

N6R5aqu3

Barrette - Cross

1 to flip through. I don't think I have seen it, but.

2 Q. Did you not believe you have seen this before?

3 A. I do not believe I have seen this series of e-mails before,  
4 no.

5 Q. Returning to the question of Inpellis' independence from  
6 BioChemics and Mr. Masiz -- I'm sorry. Before we move on,  
7 there is a subscription agreement at the back of this e-mail.  
8 Do you see that?

9 A. Yes, and I just saw that now too so go ahead and ask your  
10 question but I had just been looking at the e-mails, I just got  
11 to that at the end, so.

12 Q. Did you write this subscription agreement?

13 A. I believe I probably did. It looks like one that I  
14 typically use.

15 Q. And this was a subscription agreement for Inpellis;  
16 correct?

17 A. Yes. It was still -- actually, let me just look for a  
18 second. Yes, it was still Alterix at the time, but yes.

19 Q. I am now going to show you what has been admitted as  
20 Defendant's Exhibit 73. Is this an e-mail from you to  
21 Mr. Masiz dated May 1 of 2015?

22 A. Yes.

23 Q. As of May 1, 2015 you were counsel for Inpellis; correct?

24 A. Correct.

25 Q. And here you are writing Mr. Masiz for suggestions about

N6R5aqu3

Barrette - Cross

1 how to structure Dr. Mooney's employment contract; correct?

2 A. Correct.

3 Q. So by at least May 1 of 2015 you, as counsel for Inpellis,  
4 were drafting an employment contract for Dr. Mooney; correct?

5 A. Correct.

6 Q. And you were consulting with Mr. Masiz on that?

7 A. Correct.

8 Q. At the time Mr. Masiz had no formal role at Inpellis;  
9 correct?

10 A. That is true.

11 Q. And this was before the board of Inpellis had met with  
12 Dr. Mooney; correct?

13 A. I don't have a clear memory of the order of events so I  
14 can't say it is correct but I can't say it is incorrect either.

15 Q. To your knowledge Dr. McCoy delegated Dr. Mooney's  
16 employment contract to Marshall Sterman and John Masiz;  
17 correct?

18 A. Again, I just don't know if I was in on that assignment of  
19 that task so I don't think I can comfortably say that's  
20 correct. But, again, I don't know it to be incorrect.

21 Q. Would it be accurate to say that -- is it your testimony  
22 that you do not recall whether Dr. McCoy delegated to Marshall  
23 Sterman and John Masiz the negotiation of Dr. Mooney's  
24 employment contract?

25 A. I do not recall either way.



N6R5aqu3

Barrette - Cross

1 Q. And is it -- did you, on November 1, 2021, testify at a  
2 deposition regarding this? Do you recall that?

3 A. I don't recall it but if you have a transcript we can hear  
4 what I said.

5 Q. Well, is it possible that you had a recollection at that  
6 time of Dr. McCoy's delegating this to Marshall Sterman?

7 A. Very possible.

8 Q. And John Masiz?

9 A. Yes; quite possible.

10 Q. You, Mr. Masiz, and Mr. Sterman were the team that put the  
11 Mooney employment contract together; right?

12 A. Well, had input. I certainly drafted the agreement itself  
13 and took business-type comments from them if they were in the  
14 loop; yes.

15 Q. At this time did you advise Dr. McCoy that maintaining  
16 separation from Mr. Masiz was important to the company?

17 A. Well, I think we all knew that was important.

18 Q. Did you advise Dr. McCoy of that?

19 A. Again, I don't recall if I had a specific conversation with  
20 Dr. McCoy about it but it was, at this point, it was a, you  
21 know, powerful theme in the filings of the SEC so I was well  
22 aware he was aware of it, I just don't know if we had a  
23 conversation about it. I don't recall doing that.

24 Q. Did you advise Dr. McCoy against having John Masiz involved  
25 in this hiring process of the Inpellis CEO?

N6R5aqu3

Barrette - Cross

1 A. No, I did not. I actually thought it was important that he  
2 be involved.

3 Q. At the time Dr. Mooney was hired you knew he had been  
4 working for Alexander Capital; correct?

5 A. Yes, I knew he -- I -- yes, I was aware that he had a  
6 relationship with Alexander Capital.

7 Q. As a consultant, correct?

8 A. Yes. I mean I -- I am only hesitating because, as we all  
9 know, we know now that we established later that he was a  
10 consultant and I just can't quite remember -- we established  
11 later that he was a consultant. I don't recall whether at the  
12 time we were putting together his employment agreement if I  
13 knew exactly what his relationship was. That's all I am trying  
14 to say.

15 Q. But that was all disclosed as of -- during the process of  
16 hiring Dr. Mooney, correct?

17 A. Correct.

18 Q. And you understood that Dr. Mooney, along with Mr. Carlin  
19 and Mr. Gazdak and the team at Alexander Capital had been  
20 working on the Inpellis deal; correct?

21 A. I did have that understanding, yes.

22 Q. Do you remember testifying yesterday that Alexander Capital  
23 was requesting permission for firm commitment underwritings for  
24 the \$3.5 million to \$10 million range?

25 MR. RAND: Objection. Time period.

N6R5aqu3

Barrette - Cross

1 THE COURT: What is the ground of the objection?

2 MR. RAND: He asked are you aware that Alexander was  
3 trying to get the permission for a firm commitment offering but  
4 he didn't say in what time period so I am objecting that it is  
5 vague and may be misinterpreted.

6 THE COURT: Do you want to be a little more specific  
7 on the question, please?

8 MR. WARD: Sure.

9 BY MR. WARD:

10 Q. Do you recall the following exchange yesterday during your  
11 testimony:

12 "Q Does it indicate they're only trying to get permission to  
13 do firm commitment offerings --"

14 THE COURT: What is it in reference to?

15 MR. WARD: In reference to the CMA, the initial CMA  
16 that Alexander Capital filed in order to get firm commitment  
17 approval. I can now locate you within that context to recall  
18 the exchange.

19 THE WITNESS: I recall the exchange.

20 MR. WARD: Let me finish it to make sure you  
21 understand it.

22 THE WITNESS: You asked me a question.

23 THE COURT: No, go ahead. Finish what the testimony  
24 was.

25 MR. WARD: (reading)

N6R5aqu3

Barrette - Cross

1 "Q Does it indicate they're only trying to get permission to  
2 do firm commitment offerings for the \$3.5 million to  
3 \$10 million range?

4 "A Yes, that's what it says."

5 A. I recall that exchange yesterday.

6 Q. And you find this fact to be critically important; correct?

7 A. Correct.

8 Q. And in fact you repeated that twice yesterday: "Critically  
9 important. Critically important."

10 A. Correct.

11 Q. You testified yesterday that if you had known about this,  
12 you would have counseled the company hard to either find out  
13 that this was something that was going to happen instantly or  
14 find another underwriter.

15 Do you remember that?

16 A. I did say that.

17 Q. But, to be clear, at the time Inpellis was already looking  
18 for another underwriter; correct?

19 A. You said at the time. Could you --

20 Q. At the time the CMA was filed in June of 2015, Inpellis was  
21 already looking for other underwriters; correct?

22 A. Correct.

23 Q. And in fact never found one that was willing to take on  
24 Inpellis; correct?

25 A. Correct.

N6R5aqu3

Barrette - Cross

1 Q. Do you recall testifying that because the license Alexander  
2 Capital requested was only for up to \$10 million, and you now  
3 know that Alexander Capital was not close at all -- oh --  
4 because the license Alexander Capital requested was for up to  
5 \$10 million, you now know that Alexander Capital was not close  
6 at all to getting a license for firm commitment underwriting.  
7 Do you recall that?

8 A. I do.

9 Q. Let's go back and look at the document on which you base  
10 this testimony. Now I direct you to Plaintiff's Exhibit 20.

11 MR. WARD: This is plaintiff's exhibit so it has  
12 already been admitted.

13 THE COURT: Which means it is somewhere in this pile.  
14 Do you happen to have -- does someone happen to have another  
15 copy? Or maybe my law clerk.

16 LAW CLERK: What is the number?

17 MR. WARD: Plaintiff's Exhibit 20.

18 LAW CLERK: Yes.

19 THE COURT: OK. We have got it. Go ahead.

20 MR. WARD: Have a copy for the witness, your Honor?

21 THE WITNESS: I don't have one.

22 MR. RAND: It is in that pile there.

23 THE WITNESS: I can look.

24 MR. WARD: Do you have a binder?

25 MR. WRIGHT: We have got --

N6R5aqu3

Barrette - Cross

1 MR. WARD: Mr. Barrette, I have got it.

2 THE WITNESS: Thank you.

3 BY MR. WARD:

4 Q. So this Plaintiff's Exhibit 20 is Alexander Capital's June  
5 3, 2015 continuing membership agreement application; correct?

6 A. Correct.

7 Q. This is a document on which you based your testimony that  
8 Alexander Capital was requesting firm commitment underwriting  
9 up to \$10 million; correct?

10 A. Correct.

11 Q. So let's turn to page 4 of 33.

12 A. I'm there.

13 Q. OK. Seven lines down it says: In addition, the firm  
14 intends to develop investment banking as a major business line  
15 and will devote substantial resources towards that end.

16 Do you see that?

17 A. Yes.

18 Q. That sentence doesn't indicate that Alexander Capital was  
19 requesting a license for only up to \$10 million in firm  
20 commitment underwriting, does it?

21 A. That sentence does not contain those words.

22 THE COURT: So -- I'm sorry. Sorry.

23 MR. WARD: Seven lines down.

24 THE COURT: I see it but then the following, if I am  
25 at the right place, a little further it says: The firm

N6R5aqu3

Barrette - Cross

1 anticipates that it will participate in two or more public  
2 offerings per year in the \$3,500,000 to \$10 million range.

3 MR. WARD: Correct, your Honor. I was about to get  
4 there and I am going to read the other sentence in front of it  
5 which is the request for the additional business line.

6 THE COURT: All right.

7 BY MR. WARD:

8 Q. So, do you see the next sentence in between the two  
9 sentences there that we have read that: In that regard, the  
10 firm is requesting that it be permitted, by its restrictive  
11 agreement, to act as managing underwriter and selling group  
12 member and firm commitment underwriting.

13 Do you see that?

14 A. I do.

15 Q. And that particular sentence doesn't indicate that this  
16 request is limited o to \$10 million, does it?

17 A. Correct. You read the sentence accurately.

18 Q. And now we go to the next sentence. It says: The firm  
19 anticipates that it will participate in two or more public  
20 offerings per year in the \$3.5 million to \$10 million range.

21 Do you see that?

22 A. Yes.

23 Q. And that sentence refers to a \$3.5 million to \$10 million  
24 range; right?

25 A. Yes.

N6R5aqu3

Barrette - Cross

1 Q. But it doesn't affirmatively say Alexander Capital will not  
2 participate in public offerings above \$10 million; does it?

3 A. I think you read the sentence accurately.

4 Q. And the sentence certainly doesn't say that Alexander  
5 Capital is requesting a firm commitment license that only goes  
6 up to \$10 million, does it?

7 A. I think the sentence speaks for itself.

8 Q. Well, do you agree?

9 A. I agree that you read the sentence accurately.

10 THE COURT: Well, I'm not quite sure, since this  
11 document is one that was submitted asking for permission from  
12 FINRA, is it defense counsel's position that the sentence we  
13 have just read was cleverly designed to conceal that you wanted  
14 permission to do much larger underwritings?

15 MR. WARD: Absolutely not, your Honor. This is  
16 simply --

17 THE COURT: Isn't this intended to give FINRA an idea  
18 of the kind of underwritings you anticipated?

19 MR. WARD: And that was the kind of underwritings that  
20 the firm did anticipate.

21 THE COURT: And so doesn't that indicate that the firm  
22 does not anticipate larger underwritings?

23 MR. WARD: It anticipates ones in this range and two  
24 or more a year. That was a reasonable estimate of what they  
25 anticipated. This was not -- this is their first deal that



N6R5aqu3

Barrette - Cross

1 they have had so they would anticipate other deals being in a  
2 lower range, so this is a reasonable way to anticipate the  
3 future and I can ask Alexander Capital people about that.

4 THE COURT: No, no. What I am trying to get at is how  
5 would a reasonable person at FINRA have read this, and the  
6 reasonable person at FINRA would have read this as saying this  
7 is the level at which we are at, yes? Yes?

8 MR. WARD: This is what they anticipate going forward;  
9 yes, your Honor.

10 THE COURT: All right. Go ahead.

11 BY MR. WARD:

12 Q. There is nothing in here, nowhere in this document does  
13 Alexander Capital indicate that it was requesting a license for  
14 only up to \$10 million in firm commitment underwriting, does  
15 it?

16 MR. RAND: Objection.

17 THE COURT: No, I will allow that. I mean, well, the  
18 document speaks for itself, as they say, though I often wonder  
19 about that objection since I have never met a speaking document  
20 but I will assume that's the case.

21 MR. WARD: Your Honor, I am asking because he  
22 testified as to what he understood and what he would have done  
23 based on --

24 THE COURT: No, no. I know you are going through what  
25 the basis was. I just think if you want to -- if where you

N6R5aqu3

Barrette - Cross

1 were leading was -- so, do you want to reformulate your  
2 position or not from yesterday? I will ask that question.

3 THE WITNESS: No, because I frankly think that the  
4 equally or more important sentence is the one before it where  
5 it is them acknowledging to FINRA that they don't currently  
6 have the ability to do a firm commitment underwriting, where  
7 nearly a year before they had represented to us that they had  
8 that ability by saying that they were going to -- by  
9 engaging -- executing an engagement letter with us.

10 MR. WARD: Your Honor, I would ask to strike that as  
11 non-responsive.

12 THE COURT: Well, I won't strike it but I understand  
13 what you are saying.

14 BY MR. WARD:

15 Q. Let's see now whether FINRA viewed this as a request for  
16 firm commitment underwriting only up to \$10 million. Let's  
17 look at Plaintiff's Exhibit 21. So you still have the  
18 plaintiff's exhibits with you?

19 A. Yes. I have it.

20 Q. You were testifying to yesterday the first sentence here  
21 says on June 3rd, 2015, FINRA's application program (staff)  
22 receive a team membership application (application) for  
23 Alexander Capital LLP (the firm) which requested approval (a)  
24 for an ownership change; (b) to engage in firm commitment  
25 underwriting.

N6R5aqu3

Barrette - Cross

1 Do you see that?

2 A. Yes.

3 Q. In the document you testified to yesterday FINRA has not  
4 indicated that Alexander Capital has put any limitation to its  
5 request for firm commitment underwriting, does it?

6 A. I'm sorry. Could you repeat the question? I just didn't  
7 quite follow it.

8 Q. Nowhere in this document does FINRA indicate that Alexander  
9 Capital has put any limitation to its request for firm  
10 commitment underwriting.

11 A. That is true.

12 Q. Do you recall reading another part of this document to the  
13 Court yesterday?

14 A. Yes.

15 Q. Do you recall testifying the following about this document:  
16 "The reason that is important is in the parlance of FINRA --  
17 and you can see it in the application, expansion of its  
18 business covers getting permission to do firm commitment  
19 underwritings so they were being told pretty quickly after they  
20 submitted that application: Do not do any firm commitment  
21 underwritings."

22 "Q Is this a document that would have been important for you  
23 to see at the time you were advising the company?

24 "A This is now getting really critical. Now they're obviously  
25 in hot water with FINRA."

N6R5aqu3

Barrette - Cross

1           You also said, testified yesterday you are not an  
2 expert on FINRA; correct?

3 A. Correct.

4 Q. Are you aware that this June 11, 2015 letter is a typical  
5 response from FINRA to the file of a CMA?

6 A. No, I'm not an expert on FINRA.

7 Q. Are you aware that this is essentially a form letter from  
8 FINRA that indicates to proceed to CMA application and that the  
9 firm can't move forward with whatever business line changes it  
10 has requested simply because it has filed a CMA?

11 A. I wasn't aware of that but I don't doubt it.

12           THE COURT: But I'm not understanding the relevance.

13           MR. WARD: Your Honor, he was testifying --

14           THE COURT: They say that the firm is prohibited from  
15 effecting any portion of the aforementioned ownership change,  
16 in other words you can't make a firm commitment and the firm is  
17 also prohibited from affecting any additional changes in  
18 ownership regardless of percentage amount. The firm is  
19 prohibited from making any changes or expansions to its  
20 business activities including the addition of any associated  
21 persons and/or offices. The above and/or restrictions are  
22 effective immediately and shall remain in full force and effect  
23 until various things like the approval.

24           So, what does it matter whether this is a standard  
25 form or not?

N6R5aqu3

Barrette - Cross

1 MR. WARD: Well --

2 THE COURT: It is a clear, unequivocal statement in  
3 response to the request of Alexander to do firm commitments  
4 that as of now you are forbidden to do it; right?

5 MR. WARD: Correct, your Honor. There is no dispute  
6 that Alexander Capital at this point, it had just found out  
7 that it could not move forward on a firm commitment  
8 underwriting without approval.

9 THE COURT: So.

10 MR. WARD: That's why they filed the application.

11 THE COURT: So I come back to questions I have sort of  
12 raised before and some of which were resolved already in my  
13 summary judgment opinion, but just so I understand Alexander's  
14 position in this trial, there is no dispute, is there, that at  
15 the time Alexander entered into the agreement with Inpellis'  
16 predecessor that it would make a firm commitment offering that  
17 it had no legal authority to do that? True?

18 MR. WARD: It had -- it didn't have current authority  
19 at the time to move forward with a firm commitment underwriting  
20 without approval; correct.

21 THE COURT: And that after it applied to change that  
22 situation it received this document, P 21, that said until we  
23 approve you can't do a firm commitment. True?

24 MR. WARD: True.

25 THE COURT: And when is it that you contend that

N6R5aqu3

Barrette - Cross

1 Alexander revealed to Inpellis that it did not have authority  
2 to do a firm commitment?

3 MR. WARD: Your Honor, obviously they knew by  
4 September 10th. There will be in evidence additional  
5 disclosures that were made, e-mails that were sent in June of  
6 2015.

7 THE COURT: OK. So what is your position as to why  
8 the original contract, where they said we will make a firm  
9 commitment, wasn't a lie?

10 MR. WARD: A lie requires intent, your Honor.

11 THE COURT: So we are back to the issue which is very  
12 much an issue in this trial: Intent. Why do you say you were  
13 lacking an intent?

14 MR. WARD: Your Honor, just -- well, you have decided  
15 this was a misrepresentation but we would also reserve our  
16 right that in looking at the document it was only saying an  
17 intent to move forward under firm commitment.

18 THE COURT: That's preserved for any possible appeal  
19 but on that I have already ruled.

20 MR. WARD: Yes, your Honor.

21 THE COURT: But my question is on the issue that's now  
22 before me of what your intent was --

23 MR. WARD: Yes, your Honor.

24 THE COURT: -- what is your argument that this was  
25 not an intentional lie?

N6R5aqu3

Barrette - Cross

1 MR. WARD: Because the firm was unaware, they believed  
2 they had authority at the time. This was their first firm  
3 commitment underwriting they engaged in and they were not aware  
4 that they didn't have authority until May 15 or sometime near  
5 after when it received the unreasonable letter that's been  
6 referred to before. At that point they found out and then they  
7 make this application to get approval and they weren't trying  
8 at any point before then because they didn't know. They were  
9 months and months, almost a year between --

10 THE COURT: OK. So, that's very helpful. I'm trying  
11 to get more of the context since we spent an awful lot of time  
12 on just one witness and I want to get a broader picture.

13 So, what is -- this witness has indicated that  
14 Alexander directly or indirectly indicated that this was a  
15 routine matter that could easily be cured or words to that  
16 effect. Are you going to deny that those representations were  
17 made or do you say that they were made but made in good faith?

18 MR. WARD: Made in good faith.

19 So, the firm understood that -- and certainly this  
20 letter, which was referred to by Mr. Barrette as saying they  
21 were in hot water, didn't indicate anything like that. This  
22 still indicated they were in a routine process.

23 THE COURT: I understand that is the point of your  
24 cross-examination and just to move things along I don't  
25 normally regard a witness' characterization of the state of

N6R5aqu3

Barrette - Cross

1     affairs through cliches as being particularly material to my  
2     determinations, but the one I am interested in is it's not that  
3     you deny that the representations were made that this could  
4     easily be fixed and we will fix it, it is that you believe that  
5     was true.

6             MR. WARD: There is not a strong record that they were  
7     saying it easily could be fixed. This was always clear that it  
8     was in FINRA's hands and then by all parties this was out of  
9     their control but they did have an understanding that they were  
10    hoping to get this done soon.

11            THE COURT: All right. So, as usual, my schedule is,  
12    to use a cliché, screwing things up, because I have another  
13    matter that I have to take downstairs at 12:45. So, why don't  
14    we take our lunch break now and we will resume at -- I will try  
15    very, very hard to be back by 1:45 so you will have a little  
16    more than an hour for lunch and we will pick up -- let me ask  
17    my law clerk, do we have anything else on this afternoon?

18            LAW CLERK: Let me check -- no.

19            THE COURT: No. OK. So we can go with -- we will  
20    take a short break at some point in the afternoon but we will  
21    go to 5:00 then without any problems.

22            Let me mention one other thing. I don't know that my  
23    law clerk had told counsel that, number one, we will not be  
24    sitting this Friday; and number two, the court house is closed  
25    next Monday on the theory that when July 4th is on a Tuesday



N6R5aqu3

Barrette - Cross

1 one should have a sense of patriotism and take at least two  
2 business days off. So, we will have a break from Thursday  
3 evening through and pick up again on July 5, so I just wanted  
4 to make sure you all understood that. I have no control over  
5 that, obviously.

6 OK. We will see you all at 1:45.

7 (Luncheon recess; continued on next page)

N6RQacu4

Barrette - Cross

## AFTERNOON SESSION

1:45 p.m.

THE COURT: How much more does defense counsel have on cross?

MR. WARD: I would say about 30 minutes, your Honor.

THE COURT: That's great.

Thomas-Barrette, resumed.

CROSS-EXAMINATION CONTINUED

BY MR. WARD:

MR. WARD: Your Honor, as a reminder, we will be breaking in our testimony at 2:00.

THE COURT: To take that other matter -- that other witness, yes. Was that for 2:00 or 2:30?

MR. RAND: 2:00.

THE COURT: Okay.

MR. WARD: May I resume?

THE COURT: Yes. I was just thinking, that requires presumably the Court to have some technological expertise which, as far as I know, it is unknown in the entire federal judiciary, but we'll do the best we can.

MR. WARD: Thank you, your Honor.

BY MR. WARD:

Q. Mr. Barrette, you understand you're still under oath?

A. I do.

Q. Are you able to testify today that -- first, let me refer

N6RQacu4

Barrette - Cross

1 you back to the exhibit we were discussing, which was  
2 Plaintiff's Exhibit 21, the June 15 letter.

3 A. I have it.

4 Q. Are you able to testify today that Plaintiff's Exhibit 21,  
5 the June 15, 2015 letter, is it anything other than FINRA's  
6 routine response to a CMA request for a change in business  
7 lines?

8 A. I cannot.

9 Q. You can't testify to any knowledge that FINRA even allows  
10 limited requests for firm commitment approval?

11 MR. RAND: Objection.

12 THE COURT: Sustained.

13 Q. Mr. Barrette, you had testified earlier it was your  
14 understanding that Alexander Capital was asking for limited  
15 approval for firm commitment underwriting only up to  
16 \$10 million, correct?

17 A. I testified as to what I had read in the application into  
18 that number, yes.

19 Q. But you testified that they were seeking authority only up  
20 to \$10 million, correct?

21 A. Yes.

22 Q. Are you able to testify today as to any knowledge that  
23 FINRA allows requests for firm commitment underwritings to be  
24 limited by amount?

25 A. No, I don't -- as I said, I'm not a FINRA expert. I don't

N6RQacu4

Barrette - Cross

1 know.

2 Q. I'm now going to show you what has been admitted as  
3 Defendant's Exhibit 70. Mr. Barrette, is this an email from  
4 Mr. Masiz to you and Dr. McCoy?

5 A. Yes.

6 Q. And it was sent on April 1, 2015?

7 A. Yes.

8 Q. As of April 1, 2015, Dr. McCoy was the CEO of Inpellis, and  
9 you were the company counsel, correct?

10 A. Correct.

11 Q. In this email Mr. Masiz was encouraging the two of you to  
12 make bylaw changes to Inpellis, correct?

13 A. Correct.

14 Q. Did that concern you at the time?

15 A. No.

16 Q. You knew keeping Mr. Masiz and Inpellis separate was  
17 important to the company's future at the time, correct?

18 A. Correct.

19 Q. Did you inform Dr. McCoy or Mr. Masiz that this was  
20 improper?

21 A. No.

22 Q. Did you inform either of them that this could hurt the  
23 chances of Inpellis and moving forward with funding because of  
24 a mixture of control between Mr. Masiz and Inpellis?

25 A. No.

N6RQacu4

Barrette - Cross

1 Q. You testified yesterday in response to questioning by Judge  
2 Rakoff that investors had been misled about a firm commitment  
3 IPO, correct?

4 A. Yes.

5 Q. These were the bridge lenders that I'm referring to.

6 A. Correct.

7 Q. Do you recall the following exchange with the Court:

8 "THE COURT: The bridge loans were made with the  
9 understanding that there was a firm commitment. Yes?

10 "THE WITNESS: Absolutely.

11 "THE COURT: So now you might have problems because  
12 the bridge loan lenders had in effect been misled?

13 "THE WITNESS: Correct."

14 Do you recall that?

15 A. I do.

16 Q. There is nothing in the bridge loan terms themselves that  
17 refer to a firm commitment IPO, correct?

18 A. I don't have the terms in front of me, so I don't remember.

19 Q. Do you have any recollection they did?

20 A. I don't have a recollection either way.

21 Q. And you went through them yesterday, correct?

22 A. Yes, we looked at the paperwork yesterday.

23 Q. Because at the time of the bridge loan, the registration  
24 statements were in draft form and nonpublic, the only way  
25 bridge lenders would access them would be through

N6RQacu4

Barrette - Cross

1 confidentiality agreements, correct?

2 A. Correct.

3 Q. And you specifically recall any investor who took out a  
4 confidentiality agreement to view the draft registration  
5 statements?

6 A. I don't recall as we sit here today specific  
7 confidentiality agreements. I assume we did ask for them.

8 Q. And, regardless, having a firm commitment language in a  
9 draft registration statement was not improper, even though  
10 Alexander Capital lacked firm commitment approval because as  
11 long as Alexander Capital still intended to get firm commitment  
12 approval, and still handle it on a firm commitment basis, the  
13 registration statement could be filed on a nonpublic basis as a  
14 firm commitment underwriting up until the point of the actual  
15 underwriting agreement and IPO itself. Is that correct?

16 MR. RAND: Objection.

17 THE COURT: Sustained as to form.

18 Q. Regardless, having firm commitment language in a draft  
19 registration statement at the time that Alexander Capital  
20 lacked firm commitment approval was not improper, correct?

21 A. Correct.

22 Q. Do you recall any bridge investor ever communicating with  
23 you, either before or after Inpellis defaulted on the loan,  
24 anything about the firm commitment underwriting representation  
25 in the draft registration statements?

N6RQacu4

Barrette - Cross

1 A. I don't recall.

2 Q. In fact, the bridge lenders did bring an action regarding  
3 their investment, didn't they?

4 A. Yes.

5 Q. Who did they sue?

6 THE COURT: Or alternatively, whom did they sue?

7 Q. Grammatically, whom did they sue?

8 A. I -- two things. First of all, I was involved in that  
9 matter. I want to be clear about that. But I honestly -- I'm  
10 quite sure they sued Inpellis. I forget the details.

11 Q. Did they sue Alexander Capital?

12 A. I don't recall.

13 Q. You have no recollection they did, correct?

14 A. Correct.

15 Q. Do you remember the following exchange from yesterday about  
16 the bridge loan:

17 "Q. Do you recall the cost to Inpellis of the bridge loan? Was  
18 there a fee to Alexander of \$500,000?

19 "A. Yes. We looked at the amendment to the engagement letter  
20 that established that fee, and that was absolutely paid to  
21 Alexander, incurred and paid."

22 Do you recall that?

23 A. Yes.

24 Q. Is that still your testimony today?

25 A. Yes.

N6RQacu4

Barrette - Cross

1 Q. Have you heard of the firm Gilford Securities?

2 A. No.

3 Q. Are you aware of their role in the bridge loan?

4 A. No. The name is not familiar to me, at least today.

5 Q. Are you aware of ADEC, A-D-E-C, one of the investors?

6 A. Yes.

7 Q. Are you aware of Burke Ross?

8 A. Yes.

9 Q. Are you aware that they were brought to the deal for the  
10 bridge loan through Gilford Securities?

11 A. I don't have a strong recollection of that where we sit  
12 today, but I'm not saying that's wrong. I just don't have a  
13 strong recollection of it.

14 Q. Are you aware that Gilford Securities collected eight  
15 percent on the investment they brought in with the bridge loan?

16 A. Today I don't remember that. I may have known at the time.

17 Q. But you can't dispute that at this point?

18 A. I'm not disputing it.

19 Q. Are you aware of the fact that Alexander Capital received  
20 only a minority of the overall \$500,000 fee?

21 A. I was -- I do not recall that, but I'm not saying it's  
22 untrue.

23 Q. You're no longer absolutely sure that Alexander Capital was  
24 paid \$500,000, right?

25 A. Correct.



N6RQacu4

Barrette - Cross

1 Q. Are you aware that Gilford's role gave rise to the request  
2 for additional fees from eight to ten percent?

3 A. I was not aware of that.

4 Q. Just to be clear, from September 10, 2015 forward, you --  
5 and this is to your personal knowledge -- you, Dan Glosband,  
6 Jan Schlichtmann, Pat Mooney, Jack Clarke, Jack Altshuler and  
7 Marshall Sterman all were aware that Alexander Capital lacked  
8 firm commitment underwriting approval, correct?

9 A. Correct.

10 Q. Do you recall testifying yesterday about concerns raised  
11 with the public filing of the S-1 in November of 2015 regarding  
12 penny stocks?

13 A. I'm sorry, you said November 2015?

14 Q. Yes, in the public S-1.

15 A. What I recall is that -- where I recall seeing the term  
16 penny stock was in the SEC comment letter on the public S-1.  
17 So that I do recall, yes.

18 Q. Do you recall saying, "They were worried about risk  
19 factors, whether we'd raise enough money, whether we'd get  
20 listed on NASDAQ, whether we'd be a penny stock, which is just  
21 not the goal of -- in a nutshell, an IPO isn't worth doing if  
22 you're going to come out as a penny stock and raise a couple  
23 million dollars." Do you recall that?

24 A. I do.

25 Q. Do you recall me asking you at your deposition if you knew

N6RQacu4

Barrette - Cross

1 the definition of a penny stock?

2 A. I don't recall, but it was a year -- a little over a year  
3 ago, but if it's in the transcript, I certainly don't deny  
4 saying it.

5 Q. Have you since your deposition looked up the definition of  
6 a penny stock?

7 A. I don't think so.

8 Q. Do you know what a penny stock is?

9 A. My sort of practical understanding of it is that I do know  
10 what it is, yes.

11 Q. What is it?

12 A. It's a stock that's trading for less than a dollar.

13 Q. Less than a dollar?

14 A. Correct.

15 Q. Does the SEC define a penny stock as a stock valued under  
16 \$5?

17 A. It may. I don't know that definition where I sit today.

18 Q. But it could be possible -- you don't dispute that that is  
19 a possible definition of the SEC?

20 A. If you have an SEC regulation or other official statement  
21 of the SEC that says that, I obviously would not disagree with  
22 it.

23 Q. According to every draft registration statement filed by  
24 Inpellis from the start of April 2015, the Inpellis stock  
25 already qualified as a penny stock. Is that right?

N6RQacu4

Barrette - Cross

1 MR. RAND: Objection.

2 A. I don't understand the question. Sorry.

3 Q. The question is, according to every draft registration  
4 statement filed by Inpellis from the very start in April of  
5 2015, Inpellis stock had already qualified as a penny stock?

6 A. I'm sorry. That question doesn't make sense to me. When  
7 you say qualified, qualified by whom? Under what definition?  
8 Who's qualifying it? I don't understand what you mean by  
9 qualified.

10 Q. It was a penny stock. Is that fair to say?

11 MR. RAND: Objection.

12 THE COURT: So I don't recall seeing anywhere in the  
13 Inpellis filings the use of the term penny stock. So the  
14 question then subsumes something that is not in evidence, which  
15 is how a penny stock is defined and by whom and under what  
16 circumstances.

17 So I sustain the objection. I think we're ready  
18 for -- I'm sorry, we'll continue after.

19 (Witness not present)

20 THE COURT: Please call your witness.

21 MR. RAND: I'd like to call Mr. Frank Manguso.

22 FRANCIS ALFRED MANGUSO,

23 called as a witness by the Plaintiff,

24 having been duly sworn, testified as follows:

25 THE COURT: Please state your full name and spell it

N6RQacu4

Manguso - Direct

1 for the record.

2 THE WITNESS: Francis Alfred Manguso. M-A-N-G-U-S-O.

3 THE COURT: Counsel.

4 DIRECT EXAMINATION

5 BY MR. RAND:

6 Q. Mr. Manguso, what was your position at Inpellis?

7 A. I was chief financial officer.

8 Q. And how long were you in that position?

9 A. Four years?

10 Q. Do you recall which years?

11 A. 2014 through 2018.

12 Q. And were you given Plaintiff's Exhibit 3 prior to this  
13 deposition -- I mean, prior to this testimony?

14 A. Yes, I was.

15 Q. And can you identify Plaintiff's Exhibit 3?

16 A. Does someone have the exhibit?

17 Q. Were you not sent the exhibit?

18 A. Yes, I was.

19 THE COURT: So what is it? What is the exhibit?

20 THE WITNESS: Exhibit 3 is a spreadsheet prepared by  
21 Elizabeth Russo and myself for specific dates in 2015 to 2016  
22 listing all of the transactions in the cash disbursements book  
23 and then spreading them across in an Excel spreadsheet by  
24 appropriate category.

25 Q. Was it prepared in -- sorry.

N6RQacu4

Manguso - Direct

1 A. And -- this was prepared contemporaneous with the  
2 production of the schedule and my notes at the bottom were  
3 added in 2018.

4 Q. Was it prepared in the ordinary course of business?

5 A. Yes, it was.

6 Q. And was it the regular business of Inpellis to keep these  
7 types of business records?

8 A. Yes, it was.

9 MR. RAND: I would like to move for the admission of  
10 Plaintiff's Exhibit 3.

11 MR. WRIGHT: Objection, your Honor. We'd like to ask  
12 a few followup clarifying questions.

13 THE COURT: Go ahead.

14 VOIR DIRE EXAMINATION

15 BY MR. WRIGHT:

16 Q. Mr. Manguso, can you hear me clearly.

17 A. Yes.

18 Q. You just testified that it was prepared in relation to the  
19 schedule, if I heard you correctly. Is that accurate?

20 A. No. It was prepared contemporaneous with the issuance of  
21 checks.

22 Q. So this was created in what year?

23 A. This was created in 2015 and 2016.

24 Q. If the -- if I can do this with the technology, I am going  
25 to show what I'm now marking as Defendant's Exhibit 145. This

N6RQacu4

Manguso - Direct

1 is a rebuttal exhibit, so it has not been previously proffered.

2 THE COURT: I don't understand. You are not on cross  
3 yet. I gave you permission to voir dire this witness regarding  
4 the exhibit that he is testifying about, Plaintiff's 3.

5 You can, of course, cross-examine him and perhaps in  
6 that connection introduce exhibit -- Defendant's Exhibit 145,  
7 but it's not proper voir dire.

8 Do you have any other questions to put to him on voir  
9 dire?

10 MR. WRIGHT: Yes, I do, your Honor. I apologize.

11 BY MR. WRIGHT:

12 Q. Is it your testimony that this was not created in 2018?

13 A. Yes, it was not created in 2018. The note was created in  
14 2018.

15 THE COURT: Which you indicated already in your  
16 previous testimony?

17 THE WITNESS: Yes, your Honor.

18 BY MR. WRIGHT:

19 Q. And the allocations represented on Plaintiff's Exhibit 3,  
20 were those created in 2018 as well?

21 A. They were created in 2016 and 2015 as the checks were  
22 issued.

23 Q. And where would we find the contemporaneous record that  
24 does not contain this note?

25 A. Where do you -- excuse me, where do you find --

N6RQacu4

Manguso - Direct

1 Q. Where would you have stored these documents as they were  
2 being created?

3 A. They would have been in Elizabeth Russo's office. She was  
4 the controller.

5 Q. Would they also have been stored on the Inpellis server?

6 A. Yes, they would.

7 MS. COLE: Thank you, I have no further questions.

8 We are going to object based on our spoliation motion.  
9 We believe this document itself reflects a later creation date  
10 than contemporaneous, and absent the contemporaneous records  
11 that were actually created at the time, we think we are unable  
12 to properly question the witness on this document.

13 THE COURT: So those are objections that are not  
14 without some force, but in the end they are overruled, except  
15 the note created in 2018 will be redacted.

16 But otherwise the exhibit is received.

17 MR. RAND: Thank you, your Honor.

18 (Plaintiff's Exhibit 3 received in evidence)

19 DIRECT EXAMINATION CONTINUED

20 BY MR. RAND:

21 Q. Mr. Manguso, so were you also sent Plaintiff's Exhibit 101?

22 A. Yes, I was.

23 Q. And what is Plaintiff's 101?

24 A. That is a request from Elizabeth Russo to Rob Radovich at  
25 Marcum asking for a complete listing of Marcum's accounts

N6RQacu4

Manguso - Direct

1 receivable to date.

2 Q. Is there an attachment to that email? Actually, at the  
3 top, is there a response to her request?

4 A. Yes, there is. And the response is to list in detail the  
5 gross amount due on every invoice that Marcum sent to us, and  
6 then a listing of all items that were paid coming to a net of  
7 some 40 some-odd thousand dollars.

8 Q. Is that a document that was kept in the ordinary course of  
9 business of Inpellis?

10 A. Yes, it was.

11 Q. Was it the ordinary business of Inpellis to keep these  
12 documents?

13 A. Yes.

14 MR. RAND: Plaintiff's move for the admission of  
15 Plaintiff's 101 into evidence.

16 MR. WRIGHT: No objection, now that foundation has  
17 been laid.

18 THE COURT: Received.

19 (Plaintiff's Exhibit 101 received in evidence)

20 MR. RAND: Thank you very much, Mr. Manguso.

21 THE WITNESS: You're welcome.

22 THE COURT: Any cross-examination?

23 MR. WRIGHT: None, your Honor.

24 THE COURT: Very good. Thank you very much. We can  
25 sign you off then. Thank you for being available.



N6RQacu4

Barrette - Cross

1 (Witness excused)

2 THE COURT: All right let's get the witness back, the  
3 live witness, so to speak, and we'll continue.

4 THOMAS L. BARRETTE, resumed

5 CROSS-EXAMINATION CONTINUED

6 BY MR. WARD:

7 MR. WARD: May I resume, your Honor?

8 THE COURT: Yes.

9 Q. Mr. Barrette, I've just handed you what has been admitted  
10 as Defendant's Exhibit 17. This is the April 8, 2015 S-1  
11 filing by Inpellis, correct?

12 A. Correct.

13 Q. This is the initial filing by Inpellis?

14 A. Correct.

15 Q. Would you turn to page 56, please, 56 of 136.

16 A. I am looking at it.

17 Q. You see there's a chart in the middle?

18 A. Yes.

19 Q. And the second line on the chart says fair market value of  
20 common stock per share, correct?

21 A. Yes.

22 Q. You understand that's referring to Inpellis's common stock,  
23 correct?

24 A. Let me just read the beginning of the note. Yes.

25 Q. You see the same line where it shows that in 2013 the fair

N6RQacu4

Barrette - Cross

1 market value of the common stock was \$2.98 a share as of  
2 December 31, 2013? Do you see that?

3 A. Yes.

4 Q. Then do you see that on December 31 of 2014, the fair  
5 market value of the common shock per share was at \$3.90,  
6 correct?

7 A. Yes.

8 Q. Those are less than \$5, correct?

9 A. Correct.

10 Q. And as a side note, yesterday you were testifying about  
11 Plaintiff's Exhibit 3, which listed the cash disbursements by  
12 Inpellis that we just talked about -- that's just been  
13 introduced. Do you recall testifying about that document?

14 A. I definitely recall testifying. I might want to see  
15 Exhibit 3 again to remember what it was, or maybe you can tell  
16 me what it was to jog my memory.

17 Q. The chart was cash disbursements, and in reference to that,  
18 during that discussion you said that you knew the bookkeeping  
19 and crew at Inpellis was rigorous about entering this  
20 information. Do you recall that?

21 A. I do recall that, yes.

22 Q. And you helped draft each of Inpellis' registration  
23 statements, correct?

24 A. Correct.

25 Q. Including this Defendant's Exhibit 17, correct?

N6RQacu4

Barrette - Cross

1 A. Correct.

2 Q. And you filed these. Is that right?

3 A. Correct. Technically, the printer RR Donnelley files, but  
4 they get the clearance to file from me after consultation with  
5 the rest of the team.

6 Q. And if you turn to page 10 of 136, please. I'm sorry, to  
7 15 of 136. You'll see this is where the risk disclosures are,  
8 correct?

9 A. Correct.

10 Q. The draft registration statement said: We identified -- if  
11 you look at this bolded area about one-third of the way down:

12 We identified a material weakness in our internal  
13 control over financial reporting, and if the remediation  
14 procedures we have undertaken are unable to successfully  
15 remediate the existing material weakness, then the accuracy and  
16 timing of our financial reports may be adversely affected.

17 Do you see that?

18 A. Yes.

19 Q. Do you see where it says, the third to last line of the  
20 next paragraph:

21 The material weakness is identified that we do not  
22 have adequate accounting system and our accounting staff was  
23 inadequate, both in terms of the number of personnel and their  
24 expertise and U.S. GAAP and SEC Rules and Regulations. As  
25 such, our controls and financial reporting were not designed or

N6RQacu4

Barrette - Cross

1 operating effectively.

2 Do you see that?

3 A. Yes.

4 Q. Is it still your testimony today that the bookkeeping and  
5 crew at Inpellis was rigorous about entering information?

6 A. Yes.

7 Q. And -- but this statement here is also correct, right?

8 A. Yes.

9 Q. I just have a few more documents to go over with you. I'm  
10 going to show you now Defendant's Exhibit 4. This the  
11 October 5, 2015 amended and restated engagement agreement,  
12 correct?

13 A. Correct.

14 Q. This agreement has the same language about firm commitment  
15 underwriting as is in the original July 29, 2014 engagement  
16 agreement, correct?

17 A. Correct.

18 Q. At the time this was being contemplated, you reviewed the  
19 agreement and advised Dr. Mooney that you did not see any  
20 issues with it, correct?

21 A. Correct. I probably asked him just to make sure that  
22 the -- especially the financial terms in it were as he  
23 understood them to be; just asked him to confirm that. That is  
24 typically what I do, so ...

25 Q. At the time that you advised Dr. Mooney with respect to the

N6RQacu4

Barrette - Cross

1 October 5, 2015 engagement agreement, you understood that  
2 Alexander Capital lacked FINRA approval to conduct a firm  
3 commitment underwriting for at least this Inpellis deal,  
4 correct?

5 A. Correct.

6 Q. And you saw nothing inconsistent between those two things,  
7 correct?

8 A. Correct.

9 Q. I'm going to show you what has been admitted as Defendant's  
10 Exhibit 5. Do you recognize this as a settlement agreement of  
11 November 14, 2016 between Inpellis and Alexander Capital?

12 A. Yes, I do.

13 Q. You helped negotiate this settlement agreement, correct?

14 A. Correct.

15 Q. Mr. Schlichtmann signed it on behalf of Inpellis, correct?

16 A. Correct.

17 Q. Under the terms of the agreement, page 1, paragraph one  
18 Inpellis was obligated to pay Alexander Capital \$125,000,  
19 correct?

20 A. Correct.

21 Q. Inpellis was also required by paragraph two to provide  
22 Alexander Capital with a confession of judgment, correct?

23 A. That is the title of paragraph two, yes.

24 Q. That's also the force and effect of paragraph two, correct?

25 A. I'm just taking to moment to read it. I haven't seen it in

N6RQacu4

Barrette - Cross

1     awhile.   Correct.

2     Q.   You have no memory of Alexander Capital being paid or the  
3     confession of judgment being delivered, correct?

4     A.   Correct.

5     Q.   Do you recall testifying about your Holland & Knight  
6     invoices yesterday?

7     A.   Yes.

8     Q.   Do you recall the following exchange:

9     "Q. Did you prepare these documents?

10    "A. Yes, with the assistance of the billing folks at Holland &  
11    Knight, yes.

12    "Q. Did you send these invoices to Inpellis?

13    "A. I did."

14             Let's look at Plaintiff's Exhibit 99.   That would be  
15    in the plaintiff's book.

16    A.   This book does not go to 99.   It might be over here.   I  
17    have a copy now, your Honor.

18    Q.   If you look at the top of the first page of Exhibit 99 on  
19    the left side?

20    A.   Yes.

21    Q.   Doesn't this indicate that this invoice -- and in fact this  
22    is a summary of all the invoices, correct?

23    A.   The very first page of --

24    Q.   Yes.

25    A.   No.   This is a cover page for one invoice.

N6RQacu4

Barrette - Redirect

1 Q. For one of the invoices. And this was going to BioChemics,  
2 correct?

3 A. Correct, that's what the address says.

4 MR. WARD: Okay. Nothing further.

5 THE COURT: Redirect.

6 REDIRECT EXAMINATION

7 BY MR. RAND:

8 Q. Yes. Looking at Plaintiff's 99, why was the first invoice  
9 sent to BioChemics?

10 A. It was a mistake. We had already opened a matter for the  
11 IPO, but because BioChemics was in the system and had a similar  
12 number, it was a mistake. I don't know quite how it was made.  
13 It might have been my fault. But if you look at the time, it's  
14 all related to the S-1, and so it was a mistake.

15 Q. And are the rest of the invoices and Plaintiff's 99  
16 addressed to Inpellis?

17 A. They are.

18 Q. Now, you said that it was consistent to sign the second  
19 engagement agreement with the firm commitment language with  
20 your knowledge there was no ability of Alexander to perform a  
21 firm commitment offering at the time. Why are you saying that  
22 is not an inconsistent statement?

23 A. **Because at the time we had been repeatedly assured it was a**  
24 **minor problem, on par with other kinds of FINRA issues that I**  
25 **was accustomed to see getting sorted out during the pre-IPO**

N6RQacu4

Barrette - Redirect

1 **filing process. So I was comfortable given my interactions,**  
2 **with Greenberg especially, that it was a problem that would be**  
3 **resolved.**

4 Q. We are looking for our copies. We have one be original  
5 here the defendants have a binder and the law clerk has a  
6 binder.

7 LAW CLERK: What's the number?

8 MR. RAND: P64. May I approach the witness, your  
9 Honor?

10 THE COURT: Yes.

11 BY MR. RAND:

12 Q. I would like to show the witness Plaintiff's Exhibit 64,  
13 which is already in evidence which is a general ledger trial  
14 balance.

15 MR. WARD: Your Honor's, we're going outside the scope  
16 of our cross.

17 THE COURT: Yes, my long-time ruling on that in all  
18 cases is the question will be allowed, but you may have recross  
19 regarding. Overruled.

20 Q. Can you tell me what this document is?

21 A. Yes, it's an accounting records titled General Ledger Trial  
22 Balance. If I could just have a minute. I just want to flip  
23 through it. Sorry.

24 As of December 31, 2014, and it has three columns:  
25 Consolidated, then a column that says BioChemics, and a column



N6RQacu4

Barrette - Redirect

1 that says Alterix. And then has detailed entries,  
2 accounting-type entries.

3 Q. Does it list Monserrat Partners anywhere?

4 A. I'm flipping through.

5 Q. It's on page 2, 209-10 on page 2.

6 MR. WARD: I'm going to object to lack of personal  
7 knowledge.

8 THE COURT: That's what it appears to be. Sustained.

9 MR. RAND: All I asked is if the document references  
10 Monserrat Partners.

11 THE COURT: I know that's what you asked, but have you  
12 ever seen this document before?

13 THE WITNESS: I believe in preparation, your Honor,  
14 yes, and there are elements of it that I may have seen when I  
15 was doing work for the company.

16 THE COURT: Did you have anything to do with preparing  
17 this document?

18 THE WITNESS: No.

19 Q. Do you have any understanding of what this document is?

20 THE COURT: Sustained.

21 Q. I would like to show you Plaintiff's Exhibit 65 in evidence  
22 which has already been submitted with copies. Can you identify  
23 what is Plaintiff's Exhibit 65?

24 A. Yes. This I think is a document we talked about yesterday.  
25 It's the BioChemics cap table, which is a summary of both stock

N6RQacu4

Barrette - Redirect

1 and debt.

2 MR. WARD: Objection, your Honor, to lack of  
3 foundation and lack of personal knowledge.

4 THE COURT: Did you have anything to do with preparing  
5 this document?

6 THE WITNESS: I wouldn't have prepared it. I would be  
7 familiar with it, your Honor, because you do need to understand  
8 the capital structure when you're doing work when I was  
9 originally engaged to work with BioChemics.

10 THE COURT: Is this a document you saw in that  
11 connection?

12 THE WITNESS: I don't remember if I saw it at the  
13 time.

14 THE COURT: Sustained.

15 MR. RAND: I'm sorry. Did you say sustained?

16 THE COURT: I did.

17 MR. RAND: I would like to mark for identification  
18 Plaintiff's 88, which is a fair market valuation of Alterix as  
19 of August 31, 2013, prepared by CBIZ Valuation Group. C-B-I-Z.

20 MR. WARD: Your Honor, I object to relevance.

21 THE COURT: I can't tell yet until he puts a question.

22 MR. RAND: I'm just marking it for identification.

23 Q. Have you seen this document before?

24 A. Yes, I have.

25 Q. What is this document?

N6RQacu4

Barrette - Redirect

1 A. Its title is Fair Market Valuation of Alterix, Inc. as of  
2 August 31, 2013, by CBIZ Valuation Group LLC.

3 Q. And does it reference a license between Alterix and  
4 BioChemics?

5 A. Yes, it does, and I'm looking for where, but it does, I  
6 know.

7 THE COURT: I'm sorry, is there a pending question?

8 Q. Yes, I'm asking if it mentions the license between --

9 THE COURT: So you want to help him out by pointing  
10 him to a particular page?

11 MR. RAND: I do, but I've lost my place. I apologize  
12 your Honor. I had this written down and I've lost the cite.

13 THE WITNESS: I'm looking too, your Honor.

14 THE COURT: Well, let's assume, so we don't sit here  
15 while you read 25 pages, that it references the licensing  
16 somewhere.

17 What's your followup question to that?

18 Q. The followup question is, does this valuation confirm the  
19 fact that there was a license between BioChemics and Alterix?

20 THE COURT: Sustained.

21 Q. Back in 2013?

22 THE COURT: Sustained. So we don't need to answer the  
23 previous question.

24 MR. RAND: I have no further questions for the  
25 witness.

N6RQacu4

Amato - Direct

1 THE COURT: Anything else?

2 MR. WARD: Nothing, your Honor.

3 THE COURT: Thank you so much. You may step down.

4 (Witness excused)

5 THE COURT: Please call your next witness.

6 MR. RAND: I'd like to call Mr. Joseph Amato.

7 MR. WRIGHT: Your Honor, can we have a five-minute  
8 break?

9 THE COURT: All right.

10 (Recess)

11 THE COURT: Let's get the witness on the stand.

12 JOSEPH ANTHONY AMATO,

13 called as a witness by the Plaintiff,

14 having been duly sworn, testified as follows:

15 DEPUTY CLERK: State your name and spell it slowly for  
16 the record.

17 THE WITNESS: Joseph Anthony Amato. A-M-A-T-O.

18 DIRECT EXAMINATION

19 BY MR. RAND:

20 Q. Good afternoon, Mr. Amato. My name is William Rand. I'm  
21 the attorney for the plaintiff in this action.

22 Can you please tell me when you first started working  
23 for Alexander Capital?

24 A. I'm uncertain of the actual start date. I believe it may  
25 be in 2012, early 2012.

N6RQacu4

Amato - Direct

1 Q. What was your position when you first started?

2 A. I was a representative.

3 Q. And did you ever rise to a higher position?

4 A. At one point I was an interim CEO for approximately two,  
5 three weeks, and I did hold the title of a crop and a ROP,  
6 which was just a Series 4 so I able to do option approvals  
7 principals.

8 Q. What series did you have when you were interim CEO?

9 A. I've had, my licenses were -- my brokerage licenses were --  
10 my brokerage license, there's no CEO official license. But I  
11 had a Series 7, 6, I believe 9 and 10, 24, 31, insurance  
12 license.

13 Q. What is a Series 24?

14 A. It's a gives me the right to be a supervisor if it's used.

15 Q. When did you get a Series 24?

16 A. I don't recall the dates. It was well before. It was  
17 early in my career when I was with Morgan Stanley.

18 Q. Do you still have a series 24?

19 A. I do.

20 Q. Have you had a Series 24 since you've worked at Morgan  
21 Stanley?

22 A. Yes, I believe so.

23 Q. And what does a Series 4 entitle you to do?

24 A. A Series 4 is an options license.

25 Q. I'm sorry, I meant what does a Series 24 entitle you to do?

N6RQacu4

Amato - Direct

1 A. It would allow me to be a supervisor.

2 Q. What is a supervisor?

3 A. Depends. Every firm what they would want me to supervise,  
4 oversee activities. If utilized, like I said.

5 Q. To supervise employees at a broker dealer?

6 A. Possibly.

7 Q. Is it regarding the supervision of a broker dealer?

8 A. No, not that I understand it to be.

9 Q. What did you believe a Series 4 entitled you to supervise?

10 A. Series 4 --

11 Q. Series 24.

12 A. Series 24. It depends what role they were asking me to  
13 partake of it. Different at every place I've been at.

14 Q. What roles have you used your Series 24 to enable you to  
15 supervise?

16 A. Where?

17 Q. Anywhere you choose to tell me first.

18 A. I -- in one firm, they asked me to view emails. Another  
19 firm they asked me to be just a super -- 24 present at a  
20 location but with no supervisory responsibilities. Others, one  
21 firm I reviewed some trades.

22 Q. Have you ever supervised any employees?

23 A. Prior firms, yes.

24 Q. Have you ever supervised any employees at Alexander  
25 Capital?

N6RQacu4

Amato - Direct

1 A. I don't recall as to the -- my whole tenure there if I did.  
2 I don't believe so though. I'm not certain.

3 Q. What does the test for a Series 24 entail?

4 A. The STC book, you study, and you take the test like every  
5 other licensing exam.

6 Q. What types of questions do they ask you?

7 A. I couldn't tell you today sitting here. I have no idea. I  
8 don't remember.

9 Q. What is a series 31?

10 A. I believe 31 -- I believe that was my futures license. Or  
11 that might have been my 3. I might have misspoke. It's all on  
12 my brokerage.

13 MR. RAND: May I approach the witness?

14 THE COURT: Yes.

15 Q. I would like to show you a declaration that you made in  
16 this case that was filed in the case on April 8, 2022 as  
17 document 131.

18 MS. COLE: Is the declaration on your exhibit list?

19 MR. RAND: I can give you a copy.

20 MS. COLE: Is it on your exhibit list?

21 MR. RAND: No, I'm not making it an exhibit.

22 Q. Do you recall making this declaration?

23 THE COURT: You want to give me a copy?

24 A. I do.

25 Q. Do you see in paragraph 9, you state: Broker check reports

N6RQacu4

Amato - Direct

1 are compilations of information that FINRA has obtained from  
2 different sources?

3 A. Yes.

4 Q. Is that a true statement?

5 A. I believe so.

6 Q. Do you see in paragraph 10, it says: Alexander Capital LP  
7 has some ability to influence the content of a broker check  
8 report, e.g., by making wired filings with FINRA but cannot  
9 control the ultimate content of such report?

10 A. I do.

11 Q. Is that a true statement?

12 A. I believe so, yes.

13 Q. You see paragraph 11 where it says: A broker check report  
14 is a statement by FINRA and not by the firm, which is the  
15 subject of such report?

16 A. Yes.

17 Q. P11. I would like to mark as Plaintiff's 11 for  
18 identification the brokerage check report of Alexander Capital.

19 Do you recognize this Alexander brokerage check  
20 report?

21 A. I do not.

22 Q. Have you ever seen a brokerage check report?

23 A. I've seen some over the years, yes.

24 Q. And you don't recognize this as a brokers check report?

25 A. That's not what you asked. You asked if I recognized this



N6RQacu4

Amato - Direct

1 one.

2 Q. Well, do you have any reason to believe this is not a  
3 correct broker check report?

4 A. I believe it's a broker check report.

5 Q. Do you have any reason to believe it's not a correct  
6 brokerage check report of Alexander Capital LLP?

7 MS. COLE: Objection.

8 THE COURT: Overruled.

9 A. I don't create the reports, so I don't know. I'd have to  
10 look at each line through it. If you want me to do so and then  
11 you want to ask me a question, I'd be happy to answer.

12 Q. Sure. What -- if you look on page 3 of 23 of the brokerage  
13 check report, the pages at the top.

14 A. Okay.

15 Q. You see where it says: Where did this information come  
16 from?

17 And it says: The information contained in brokers  
18 check comes from FINRA's central registration depository and is  
19 a combination of: (1) information FINRA and/or the Securities  
20 and Exchange Commissions require brokers and brokerage firms to  
21 submit as part of the registration and licensing process, and  
22 information that regulators report regarding disciplinary  
23 actions or allegations against firms or brokers.

24 Is that a correct statement?

25 A. I believe so.

N6RQacu4

Amato - Direct

1 Q. And, therefore, is all the information in the Alexander  
2 brokerage check reports from Alexander other than information  
3 that regulators report regarding disciplinary actions or  
4 allegations against the firm or its brokers?

5 A. I can't answer as such, because it says I believe it comes  
6 from FINRA's central registration depository or CRD, and is a  
7 combination of. So I don't know until we get into something  
8 specific. I can't give a general answer for a 23-page report  
9 that I will didn't cull through and I'm not familiar with.

10 Q. Looking back at your declaration, if you look at paragraph  
11 14, it states: At no time between July 29, 2014 and August 1,  
12 2016 did Alexander Capital LP understand that its membership  
13 agreement with FINRA prevented it from participating in firm  
14 commitment underwritings as a member of a selling syndicate.  
15 Is that a correct statement?

16 A. Yes.

17 Q. I would like to show you Plaintiff's 20 in evidence, which  
18 is the application for permission to do firm commitment  
19 offerings. Are you familiar with Plaintiff's P20?

20 A. I am familiar with the application, but I'm not familiar  
21 with all the language with that.

22 Q. You're familiar with the application but not familiar with  
23 what?

24 A. The language. I know what a continuing membership  
25 application is. I know we filed some, but I'm not familiar --

N6RQacu4

Amato - Direct

1 I don't put this together.

2 Q. Did you see this application at the time it was filed?

3 A. I did not.

4 Q. Were you aware of this application at the time it was  
5 filed?

6 A. I knew there was a CMA being filed.

7 Q. What did you understand the CMA was applying for?

8 A. I believe, but I'm not certain, if it was change of  
9 ownership and firm commitment underwriting.

10 Q. If you look at page 4 of 33, and it's kind of blocked out,  
11 but if you go to 5 of 33 on the bottom right and go to the  
12 left-hand side of the prior page.

13 A. So I'm looking at 4 of 33?

14 Q. Yes.

15 A. Okay.

16 Q. Then you see there's a big square block?

17 A. Okay.

18 Q. And do you see, it says: In that regard the firm is  
19 requesting that it be permitted by its restrictive agreement to  
20 act as managing underwriter and selling group member in firm  
21 commitment underwritings?

22 A. I'm sorry, where is that?

23 MR. RAND: May I approach the witness, your Honor?

24 THE COURT: Yes.

25 Q. It starts "in that regard."

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Amato - Direct

1 A. These aren't my glasses. In that regard the firm is  
2 requesting that it be permitted by its restrictive agreement to  
3 act as a managing underwriter and selling group member in firm  
4 commitment underwritings.

5 Q. Is that a true statement?

6 A. Is this what we applied for? Yes, that's what it says.

7 Q. And is your statement in your declaration true and  
8 accurate?

9 A. It is.

10 Q. I would like to show you plaintiff's 13-A in evidence,  
11 which is a communication regarding continuing membership  
12 application?

13 THE COURT: Before you get into that, so I'm looking  
14 at your declaration, and you say -- this is paragraph 12 --  
15 between July 29, 2014 and August 1, 2016, Alexander Capital LP  
16 understood it was allowed to participate in firm commitment  
17 underwritings as a member of a selling syndicate. Do you see  
18 that?

19 THE WITNESS: Yes, your Honor.

20 THE COURT: Then you say in paragraph 17: As of  
21 May 15, 2015, Alexander Capital LP understood it lacked the  
22 authority to act as lead underwriter on a firm commitment  
23 public offering. Do you see that?

24 THE WITNESS: Yes, your Honor.

25 THE COURT: But when you entered into your initial

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1 agreement with Alterix, you were -- Alexander Capital was  
2 acting as lead underwriter; in fact, exclusive underwriter.  
3 Yes?

4 THE WITNESS: Yes, your Honor. But I was a registered  
5 rep at the firm. I was not in any role of CEO, management  
6 anything at this time, and that was my understanding of what we  
7 were allowed to do, and what the company did continue to do is  
8 syndicate firm commitment dealings. And until that letter in  
9 2015 that was pointed out, at that point I knew we couldn't  
10 underwrite firm commitment deals. But again, I was -- I didn't  
11 have anything to do with the CMAs, the documents. I was a  
12 registered representative at this time of the firm. I was just  
13 a 1099 independent rep.

14 THE COURT: All right. Very good.

15 BY MR. RAND:

16 Q. If you could go to page 3, footnote 1.

17 A. Of which document?

18 Q. Plaintiff's Exhibit 13-A. Page 3, footnote 1.

19 A. Okay. 13-A, which page?

20 Q. Page 3, footnote 1.

21 A. I'm at the bottom.

22 Q. Do you see it states: A share having been previously sold  
23 to Mr. Figliola, who has never had any active control of any  
24 aspect of Alexander Capital?

25 MS. COLE: Objection. He has yet to lay a foundation

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1 with this witness for knowledge about contents of this  
2 document.

3 THE COURT: Well, I think that -- let me change the  
4 question for a minute, then we'll get to the objection.

5 The term "firm" refers to in this document, refers to  
6 Alexander Capital, right? Look at the first page, first  
7 sentence.

8 THE WITNESS: Myself, your Honor, or --

9 THE COURT: So have you ever seen this document  
10 before?

11 THE WITNESS: Myself, as we prepared for this case, I  
12 have.

13 THE COURT: All right. So you were also designated as  
14 the 30(b)(6) representative?

15 THE WITNESS: Yes. Correct.

16 THE COURT: Okay. So on the first page, it says:  
17 Dear Mr. Francois: As you know, this firm represents Alexander  
18 Capital LP "Alexander" or "The Firm." You see that?

19 THE WITNESS: Yes.

20 THE COURT: Now if you turn to page 3, at the very  
21 top, it says: In December of 2013 a full year after the last  
22 misconduct alleged by the staff, active control of the firm was  
23 sold to Messrs. Amato and Guidici Pietro. You see that?

24 THE WITNESS: I do see that, sir.

25 THE COURT: And you're Mr. Amato?

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1 THE WITNESS: I am.

2 THE COURT: So you were in active control of the firm  
3 at the time of the events that you were telling me about that  
4 you were just acting as a registered representative or the  
5 like. Yes?

6 THE WITNESS: No, that is not correct, sir.

7 THE COURT: What does it mean when it says you were in  
8 active control?

9 THE WITNESS: I believe it to be inaccurate.

10 THE COURT: You think that you didn't have active  
11 control?

12 THE WITNESS: No, I had a minority stake through an  
13 entity. I had a minority stake that I was a partner in that  
14 entity, but I wasn't actively running the firm.

15 At one point I didn't even work there during my tenure  
16 of the first two years. I left and came back. I was gone and  
17 came back. I don't know the exact dates. It would be on my  
18 CRD as well.

19 THE COURT: I guess what I'm confused about, and you  
20 anticipated my next question, the next sentence says: This  
21 Mr. Figliola, nor Messrs. Amato and Guidici Pietro were owners  
22 of the firm, managers of the firm or in any way in control in  
23 any aspect of the firm's business at the time of the alleged  
24 misconduct. And as I understand your testimony, you agree with  
25 that?

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1 THE WITNESS: Yes.

2 THE COURT: So what did the previous sentence mean?

3 THE WITNESS: Mr. Figliola at the time I believe owned  
4 75.1 percent of the firm and NESAs Management owned  
5 24.9 percent. At some point it turned over in that timeframe,  
6 and like I say, I was a registered rep with the firm. At some  
7 point, I believe, I'm not sure, it was in '12 or '13, I left in  
8 December and came back six weeks later. I was not registered  
9 with the firm. So I'm uncertain as to what it means. Like I  
10 said, I didn't put the letter together.

11 THE COURT: Did the author of this, Mr. Carmel show  
12 you this letter before he filed it?

13 THE WITNESS: I don't believe so. It wouldn't be  
14 common that I participated in any of the CMAs or language in  
15 them at this time.

16 THE COURT: All right. Go ahead, counsel.

17 BY MR. RAND:

18 Q. Are you familiar with Mr. Figliola?

19 A. I am.

20 Q. Has Mr. Figliola ever had any active control of any aspect  
21 of Alexander Capital?

22 A. I'm uncertain if he did in the beginning or when he didn't,  
23 when he did or didn't. He was a passive owner, I believe at  
24 some point, but, again, he was at the firm I believe before we  
25 came there. So I can't answer that.



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1 Q. Do you have any understanding why Alexander's attorney  
2 would state that Mr. Figliola has any never had any active  
3 control of Alexander Capital?

4 A. Like I said, he became a passive owner at some point, had  
5 an agreement with FINRA to be a passive owner, but I don't know  
6 when that went into place or took place. Like I said, he was  
7 there before myself, so I can't answer as to if he had control  
8 or when he had control or when he gave it up.

9 THE COURT: By the way, before I mangle the last name  
10 of the gentleman sitting there at counsel table, how do you  
11 pronounce your last name?

12 MR. GUIDICIPIETRO: Guidicipietro.

13 THE COURT: Thank you very much.

14 Q. I would like to mark for identification Plaintiff's 13-B, a  
15 submission on behalf of Alexander Capital LP by Scott Holcomb.  
16 Do you recognize this document?

17 A. I do not.

18 Q. Have you ever seen this document before?

19 A. I don't recall. I would have to read through it and take a  
20 look. I may have seen this throughout, you know, over the  
21 years, the last couple years while we were getting ready for  
22 this case, but...

23 Q. If you could turn to page 4. First let's look at the date  
24 of the document. The date of the document is -- if you look at  
25 page 17, the date of the document states September 29, 2015.

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1 Is that correct?

2 A. Yes.

3 Q. It states at the top of page 4: Messrs. Amato and  
4 Guidici Pietro, neither of whom were at the firm in 2010 to 2011  
5 are now active owners and partners in the firm. Is that a  
6 correct statement?

7 A. No, I'm sorry, where are you reading this.

8 Q. At the top of page 4.

9 THE COURT: The very top. It's a carryover sentence  
10 from the previous page.

11 A. I don't believe it reads correct.

12 Q. What do you believe it should read?

13 A. It would say that at this -- in '15, I would say I would be  
14 an indirect owner of the firm. I wouldn't be a partner. I  
15 would be an indirect owner and still a registered rep. I  
16 believe that's what it should read.

17 Q. So is it a false statement in this document when it says:  
18 Messrs. Amato and Guidici Pietro, neither of whom were at the  
19 firm in 2010 to 2011, are now active owners and partners in the  
20 firm?

21 A. I think it's inaccurately written, but, again, FINRA and  
22 regulators and everyone have a different way of recording how  
23 they have ownership in an entity or through an entity, so I  
24 believe it was just some -- not properly written.

25 Q. If you look at the prior page 3, you see the statement, it

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1 says: In 2012, Exitus LLC, which is owned by Joseph Figliola,  
2 become a silent partner in the firm?

3 A. Where is this page 3.

4 Q. Right at the bottom, the previous page.

5 A. After the record? Where was this?

6 Q. See where it says: During the time period covered by the  
7 staff's investigation? The bottom of page 3.

8 THE COURT: It's the last paragraph.

9 A. Yes. Yes. I'm sorry. Let me read it, sir. Yes, sir. I  
10 read it. What's the question?

11 Q. The question is, it states: During the time period covered  
12 by the staff's investigation, the firm was owned by, among  
13 others, Alan Boxer CRD 27567. In 2012, Exitus LLC, which is  
14 owned by Joseph Figliolo CRD 6116157, became a silent partner  
15 in the firm. Is that a correct statement?

16 A. I believe I said that before at some point he did. He  
17 become a passive owner, but I believe this is a 2015 document  
18 you said, correct?

19 THE COURT: Well, in any event, the sentence is  
20 referring to the time period covered by the staff's  
21 investigation, which is a little unclear. So put another  
22 question.

23 MR. RAND: I would like to move into evidence  
24 Plaintiff's Exhibit 13-B, as it was an attachment to  
25 Plaintiff's 13-A, which is in evidence and also was filed

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1 publicly.

2 THE COURT: Any objection?

3 MS. COLE: Yes. We maintain our objection to  
4 relevance and also as improper evidence under Rule 404(b).

5 THE COURT: So I'm not yet prepared to rule on whether  
6 or not the prior problems that Alexander Capital had with the  
7 government are admissible for their truth and, therefore, are  
8 admissible as 404(b) evidence, but I don't have to reach that  
9 with respect to the admission of this document for other  
10 evidence because it seems to me it is relevant to the role of  
11 the two individual defendants. So the objection is overruled  
12 with the understanding that I'm only receiving it now for those  
13 limited purposes.

14 MS. COLE: Thank you, your Honor.

15 (Plaintiff's Exhibit 13-B received in evidence)

16 Q. I'd like to mark for identification Plaintiff's Exhibit  
17 P30, which is a series of emails.

18 Mr. Amato, do you recognize these emails?

19 A. I do not.

20 Q. Do you see that you are a recipient of this email?

21 A. I'm looking at the chain right now. So it started -- I see  
22 I was cc'd on the second part of the email, it appears.

23 Q. I think it says, if you look at the top of the document,  
24 are you not in the list of people that the email is to?

25 A. I was looking at the date. There's two dates. The first

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Amato - Direct

1 one is October 13.

2 THE COURT: No, I think your point is you were only  
3 copied towards the end.

4 THE WITNESS: Correct.

5 THE COURT: But in the part where you were copied,  
6 which was on October 17, 2014, Mr. Carlin states to Mr. Mooney  
7 and Mr. Gazdak that "Rocco and Joe (copied in) have asked me  
8 for an update." Joe is you. Yes?

9 THE WITNESS: I am Joe, correct.

10 THE COURT: So what was the update you were asking  
11 for?

12 THE WITNESS: Subjects, I don't know. All I see is:  
13 Subject updated calendar and please see email chain below and  
14 provide answers, so --

15 THE COURT: If you go back to the original.

16 THE WITNESS: That's what I'm looking at.

17 THE COURT: It says -- again, you were not copied on  
18 that, but that says: I'm trying to put together a realistic  
19 calendar of what deals are on the horizon." Do you see that?  
20 The second sentence in the first email.

21 THE WITNESS: Sorry. I was looking at the October 13  
22 one. There are two October 13 ones.

23 THE COURT: The very first one, 2:47 p.m. on  
24 October 13. So this is from Chris Carlin to Mr. Mooney and  
25 Mr. Gazdak. "Help me fill in the blanks here. I'm trying to

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Amato - Direct

1 put together a realistic calendar of what deals are on the  
2 horizon."

3 Do you see that?

4 THE WITNESS: I do.

5 THE COURT: Okay. Now let's go back to where you are  
6 copied, and in between, there's an email which you're not  
7 copied on about -- it says things like "What about Volition?  
8 Conkwest? Medevax?" What are they?

9 THE WITNESS: I have no idea what the three of those  
10 are or the Volition. No idea.

11 THE COURT: So then where you are copied: "Rocco and  
12 Joe (copied in) have asked me for an update. Please see email  
13 chain below and provide answers." So at that point you got the  
14 whole chain, right?

15 THE WITNESS: No, well, I don't know, to be honest  
16 with you. I see it here. I mean, I understand --

17 THE COURT: At least the strong inference, you would  
18 agree, is that you were furnished with the whole chain, right?

19 THE WITNESS: I don't know -- possibly.

20 THE COURT: All right. Let's go through it again.  
21 The email that you're copied in says: "Rocco and Joe (copied  
22 in) asked me for an update. Please see email chain below."

23 THE WITNESS: I would assume then it did cc. to me.  
24 Yes, I would assume that then, correct.

25 THE COURT: Very good. All right. Is this evidence?

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Amato - Direct

1 MR. RAND: Yes, your Honor.

2 THE COURT: Go ahead.

3 BY MR. RAND:

4 Q. Just to confirm, are you asking them for an update on their  
5 efforts to find on their deals?

6 A. Honestly, I don't recall asking Chris. Usually Chris would  
7 only tell us when a deal is coming out, and, you know, and  
8 they're doing it. So maybe that's what he was referring to.  
9 He usually tells us what takes place from his department.

10 Q. Do you know what Silver Sun is?

11 A. Silver Sun believe was a deal.

12 Q. What deal?

13 A. Silver Sun.

14 Q. I mean, what kind of deal were you doing with them?

15 A. I don't know how it was classified or what it was. I  
16 believe it was a deal that Alexander participated in.

17 Q. Were you raising money for Silver Sun?

18 A. Like I said, I don't know the full details. I don't handle  
19 that department, sir.

20 Q. When you say "deal," what kind of deals do you do?

21 A. Banking deals.

22 Q. What is a banking deal?

23 A. I can't tell you what this was. I'm uncertain.

24 Q. Can you describe the types of deals that Alexander Capital  
25 does?

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Amato - Direct

1 A. Today? Sure. We do firm commitments. We do syndicate  
2 deals. I don't recall at this point in time. I could tell you  
3 on October '13 and '14 we did -- we were part of, you know,  
4 what I know we participated or had the ability what we thought  
5 was to do syndicate underwritings, be part of the group as the  
6 syndicate. Firm commitment underwritings, we thought we were  
7 able to do at the time until we learned in '15 that has  
8 changed.

9 So, again, I don't know how these were situated. How  
10 they were set up. I don't know if they were notes. I can't  
11 answer. You'd have to give me the deal docks. I can't guess  
12 nor will I guess. If you give me the deal docks, I'd be happy  
13 to look at it and give it my best shot then.

14 Q. Did you do any firm commitment offerings for SMI?

15 A. Excuse me?

16 Q. Did you do any firm commitment offerings for SMI?

17 A. **I just said I don't recall, I don't know.**

18 Q. Do you recall SMI?

19 A. I do not.

20 Q. Do you recall Summit?

21 A. I know the name. Again, I don't know the details around  
22 it.

23 Q. What does the name refer to?

24 A. Summit. I only know it as Summit. I know the name that's  
25 listed here. I don't know any details. I couldn't tell you a



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Amato - Direct

1 symbol. I couldn't tell you what they do. It's not my  
2 department. I don't oversee it. I don't work in it.

3 Q. Do you recognize the name Alterix?

4 A. I do.

5 Q. Do you recall what they do?

6 A. I do not.

7 Q. Do you know what they do from this case?

8 A. I don't.

9 Q. Have you read the complaint in this action?

10 A. All I heard was they were a biotech company with some sort  
11 of technology. Again, I don't get involved in this part of the  
12 business. It don't matter if I like it, love it, know it, know  
13 anything about it. It doesn't change anything for the firm or  
14 for me.

15 Q. You see where it says, "Rocco and Joe have asked me for an  
16 update. Please see email chain below and provide answers."

17 Did you receive the answers to those questions?

18 A. I don't see anything else further from this, so I can't  
19 even tell you that. Again, I --

20 Q. I've marked Plaintiff's 31 for identification. It's an  
21 email. Mr. Amato, do you recognize this email?

22 A. I do not.

23 Q. Are you listed on this email?

24 A. Yeah, I am.

25 Q. Do you have any reason to believe you did not receive this

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Amato - Direct

1 email?

2 A. I believe I received it if I'm cc'd on it.

3 Q. Who is sending you this email?

4 A. I believe Chris Carlin.

5 Q. Why is he sending you this email?

6 A. Probably because he was going to be out of the office, and  
7 he was just giving everyone around him a heads-up that he was  
8 going to be out of the office.

9 Q. You see it says, "I am meeting with Pat"?

10 A. Yes.

11 Q. Do you know who Pat is?

12 A. I do not. From this.

13 Q. Did you ever ask him who Pat was?

14 A. I do not. Like I said, Chris comes and goes, as does John  
15 Gazdak. They run their own schedules, their own times, own  
16 meetings. Sometimes he'll give a heads-up if he's not in the  
17 office or going to be late or traveling, he'll give a heads-up  
18 as a courtesy.

19 Q. Isn't sit true that you are Chris Carlin's supervisor?

20 A. That is not true.

21 Q. Is every broker dealer required to have a registered rep as  
22 a supervisor?

23 A. Repeat that.

24 Q. If you have a broker dealer, you have to have someone who  
25 has more than a Series 7. Isn't that correct?

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Amato - Direct

1 A. Yes.

2 Q. What do they have to have, what series?

3 A. The firm?

4 Q. Yes.

5 A. Someone at the firm? I don't know. Depends what  
6 department you're in.

7 Q. A broker dealer itself cannot exist without some employee  
8 at the broker dealer having more than a Series 7. Is that  
9 correct?

10 A. Yes, correct.

11 Q. What I'm asking you is, what is that additional series that  
12 one of the employees must have for the broker dealer to be in  
13 compliance?

14 A. To be chief compliance?

15 Q. To be in compliance.

16 A. Maybe a 24. I don't know what the CFO, the license they  
17 hold. I'm uncertain as to their other licenses, depending on  
18 what the firm is doing, yes.

19 Q. Who at Alexander Capital had that higher license to be in  
20 compliance with NASD rules?

21 A. 24. What timeframe was this?

22 Q. 2014.

23 A. I'm uncertain if it was Luis Restrepo, Tim Stack.

24 MS. COLE: Objection, your Honor. The email is dated  
25 2015, if he is referring to the time that he's been talking

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Amato - Direct

1 about with this email.

2 MR. RAND: The question isn't relating to the email.  
3 It's just a general question.

4 THE COURT: All right. Well, with that revision, I'll  
5 allow it.

6 A. At the time there may have been -- I'm sure there were 24s  
7 at the firm. There probably was maybe 10 or 15 of them at the  
8 firm with a 24 license. May have even been more.

9 Q. Is a broker dealer required to designate a supervising  
10 person for the broker dealer?

11 A. A chief compliance officer, yes. So I'm confused as to  
12 what structure you're asking for.

13 Q. I believe there has to be a Series 24 supervisor of the  
14 employees of the broker dealer. Are you not familiar with that  
15 rule?

16 A. I am. Like I said, I don't know what department you're  
17 referring to and whom it may be, so it would totally differ or  
18 may have. I don't know.

19 Q. A broker dealer has to designate an employee to be a  
20 supervisor to be responsible for the broker dealer when the  
21 NASD comes and asks questions?

22 A. That's not necessarily correct. I think you're confusing  
23 the license.

24 Q. Why do you believe all the members of a broker dealer can't  
25 exist with just a Series 7?

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Amato - Direct

1 A. I said there would be a chief compliance officer which  
2 would hold a 24 who would meet with the regulators as you  
3 stated, or hold meetings and inquiries. There may be someone  
4 in the compliance department with a 24 under them working  
5 handling state inquiries or helping with licensing or  
6 registrations, taking customer complaints or reviewing emails.  
7 It would depend on the person. One person at a firm very  
8 rarely I believe would handle every representative at the firm  
9 in every line of business. I think that would be -- I don't  
10 know.

11 Q. As representative at Alexander Capital, as a 30(b)(6)  
12 representative, do you have any knowledge as to who that  
13 supervising person was at Alexander Capital?

14 A. At what date?

15 Q. During 2014.

16 A. I don't recall who the head compliance officer was of the  
17 management team at that point. I'd have to look at the total  
18 records to give you an accurate answer. I can't answer to  
19 something that was almost seven eight years ago.

20 Q. How many employees were at Alexander Capital during 2014?

21 A. I couldn't tell you that either.

22 Q. Were there more than 20?

23 A. I would assume so.

24 Q. Were there more than 50?

25 A. I don't know.

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Amato - Direct

1 Q. Were there more than a hundred?

2 A. I don't believe there was a hundred.

3 Q. Do you have any idea how many employees were at Alexander  
4 Capital?

5 A. I do not at that time, no.

6 Q. Do you know how many there were in 2015?

7 A. I do not. It would be on -- I'm sure you can find it on  
8 FINRA's records somewhere.

9 Q. This email references Inpellis. Did you have any knowledge  
10 of Inpellis at the time of this email on November 19, 2015?

11 A. I don't recall when I remember Inpellis. But again, I told  
12 you what I thought of the meeting and why he sent it out.

13 Q. Did you have any involvement in the earnings of Alexander?

14 A. The who?

15 Q. Earnings.

16 A. At what time?

17 Q. During this timeframe, November 19, 2015.

18 A. I'm not certain if I was still a reg -- I think I was still  
19 just a registered rep at this point. I was part of it, if I  
20 did business, sure.

21 Q. Did you have any knowledge that approximately a \$500,000  
22 fee was earned by a bridge loan to Inpellis?

23 A. I had nothing to do with the bridge loans or banking at  
24 that time.

25 Q. I didn't ask if you had anything to do with it. I asked if

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Amato - Direct

1 you had any knowledge of the fee.

2 A. I don't know of the fee if I'm not working with the  
3 capital.

4 Q. How much money did Alexander Capital make in 2014?

5 A. I couldn't answer that. I'm not the CFO. I don't know.

6 Q. You have no idea?

7 A. I have no idea.

8 Q. How much money did you make in 2014?

9 A. Yes. If I made \$150,000, \$200, that would have been a lot  
10 of money back then.

11 Q. Did you get any percentage interest in earnings of the  
12 company?

13 A. No, just my -- whatever business I do as a representative  
14 of my customers.

15 Q. You don't get a salary?

16 A. I don't believe so then, no. I'm not certain when I became  
17 a salaried employee. It would have been later.

18 MR. RAND: I would like to move into evidence  
19 Plaintiff's Exhibit 31.

20 THE COURT: Which one?

21 MR. RAND: Plaintiff's Exhibit 31, the email we've  
22 been talking about.

23 THE COURT: Any objection?

24 MS. COLE: No objection.

25 THE COURT: Received.

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Amato - Direct

(Plaintiff's Exhibit 31 received in evidence)

Q. I would like to show you Plaintiff's Exhibit 19, which is in evidence. Have you seen Plaintiff's Exhibit 19 before?

A. I believe I have during the connection with this case and maybe a little prior.

Q. What is Plaintiff's Exhibit 19?

A. It says it's an unreasonable letter.

Q. Isn't it true that this letter indicated that Alexander Capital was not permitted to perform firm commitment underwritings?

MS. COLE: Objection. Misstates the evidence.

THE COURT: In what way do you think it misstates?

MS. COLE: The question was: Isn't it true that this letter said that Alexander Capital is not permitted to perform firm commitment underwritings. The relevant section of the letter is on page 2 under number 6 and does not contain that language that Mr. Rand indicated that the letter said.

THE COURT: Well, that's true. So the objection is sustained.

But let me ask the witness. Did you see this letter at the time -- at or about the time it was received?

THE WITNESS: I don't believe I did, your Honor.

THE COURT: Did there come a point in time when you learned that the firm could not participate as -- in giving a firm commitment where Alexander Capital was the lead?



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Amato - Direct

1 THE WITNESS: Yes, at some point I believe we received  
2 a notification from FINRA and we put in for a CMA at that  
3 point, so that's when I learned of it.

4 THE COURT: So that would have been -- do you remember  
5 approximately when that was?

6 THE WITNESS: It was sometime in '15 or '16. I'm  
7 uncertain. I think it was sometime in '15, but I'm absolutely  
8 uncertain of the exact date.

9 THE COURT: So do I have it right that you had no role  
10 in the Inpellis deal?

11 THE WITNESS: Absolutely, your Honor, no role  
12 whatsoever.

13 THE COURT: So let me ask plaintiff's counsel. And  
14 this may be something that's already before the Court. I have  
15 a vague recollection it may have been addressed in summary  
16 judgment or some other thing, but remind me of what plaintiff's  
17 counsel -- what plaintiff's theory is for including Mr. Amato  
18 in the defendants in this case.

19 MR. RAND: First of all, there's general liability for  
20 all the members of the partnership because it's deemed a  
21 general partnership.

22 THE COURT: I understand that.

23 MR. RAND: Second, he is a managing member of the  
24 firm. As a managing member, he loses any ability to be a  
25 limited partner because a limited partner who participates and

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Amato - Direct

1 is a manager of the firm is no longer able to escape.

2 THE COURT: So I understand both of those legal  
3 theories. Are you making any claim independent of those that  
4 he personally was responsible for what you allege was the  
5 misconduct of the firm?

6 MR. RAND: Yes, because we are alleging that he was  
7 reckless. Because as a manager of the firm, he took no effort  
8 to alert his employees as to the fact that there was no  
9 license, and that is a reckless act. He has a fiduciary duty  
10 to alert his employees.

11 MS. COLE: Your Honor, at this point I would just  
12 object. I don't believe that that's an allegation in the  
13 complaint. There's no allegation that Mr. Amato was  
14 individually reckless.

15 MR. RAND: Your Honor, we have an allegation directly  
16 for fraud, and fraud includes recklessness. Recklessness  
17 satisfies the scienter requirement of fraud.

18 MS. COLE: If I may, the complaint does not allege  
19 that Mr. Amato participated in the fraud. The complaint  
20 alleges that Mr. Amato and Guidici Pietro are liable --

21 THE COURT: You say that, it just goes flowing off  
22 your tongue. Go ahead. Yes.

23 MS. COLE: Yes, I am familiar with his name. That  
24 they are liable solely on the allegation that they were  
25 partners of Alexander Capital, not -- there's not a single

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Amato - Direct

1 allegation in the complaint that Mr. Amato or Mr. Guidici Pietro  
2 directly participated in any fraud activity.

3 THE COURT: All right. I think we'll excuse the  
4 witness for a few minutes while we discuss this issue a little  
5 bit more.

6 Actually, since you're a defendant, you can stay here  
7 if you want to. Why don't you step down from the stand.

8 THE WITNESS: Thank you, your Honor.

9 MS. COLE: And, expressly, your Honor, I'm referring  
10 to paragraph 7 of the complaint, which is the fourth amended  
11 complaint document 40 on the docket.

12 THE COURT: I was just looking at my summary judgment  
13 opinion, but I don't think this issue was addressed. So with  
14 respect to the complaint --

15 MR. WARD: Your Honor, you can have our copy if you'd  
16 like.

17 THE COURT: Yes. On a quick look at the complaint, it  
18 does not appear that there are any factual allegations against  
19 Mr. Amato, and that he is named solely as set forth in  
20 paragraph 7 in his capacity as a managing partner, and,  
21 therefore, under Delaware law he is: "Liable for the wrongful  
22 acts of the defectively formed limited partnership alleged  
23 herein, and are financially responsible for the debts of and a  
24 judgment that is now satisfied by the defectively formed  
25 limited partnership arising out of this action."

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1           So I don't see, but I will go back to plaintiff's  
2 counsel because I may have missed it, any suggestion that he  
3 is -- Mr. Amato or Mr. Guidicipietro are named in any other  
4 capacity.

5           MR. RAND: I guess what I'm saying is, we've sued  
6 Alexander, and Alexander is liable for the omissions and  
7 reckless behavior of their managing partner. So they are  
8 individually liable because there's a general partnership.

9           THE COURT: You're saying -- you're making a different  
10 point. You're saying that part of your proof of Alexander  
11 Capital's liability is the failure of whoever were the managing  
12 partners to exercise proper supervision.

13          MR. RAND: Correct, your Honor.

14          THE COURT: Okay. That's a different point. But  
15 that's not direct liability on the fraud claim or anything like  
16 that. It's just part of the claim against Alexander.

17          (Continued on next page)

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1 THE COURT: OK.

2 MS. COLE: I don't believe it is alleged in the  
3 complaint either what he just stated. He stated: What I am  
4 saying is, Alexander is liable for the omissions and reckless  
5 behavior of their managing partner. There is no allegations  
6 that the managing partner made any omissions or engaged in any  
7 reckless behavior.

8 THE COURT: Well, how can you say that when, taking  
9 everything as I must for purposes of this conversation, most  
10 favorably to the plaintiff, why could not a reasonable  
11 fact-finder conclude, if I took everything most favorably for  
12 the plaintiff, that their view that they could enter into an  
13 agreement where they purported to be able to act as a company  
14 that was able to give firm commitment underwritings by  
15 themselves and as lead, indeed exclusive underwriters, was  
16 reckless?

17 MS. COLE: I don't have the feed so I am not sure  
18 exactly what you just said but --

19 THE COURT: Well, that makes sense. That's what my  
20 law clerks usually say. But, anyway.

21 MS. COLE: I was trying to follow along on the  
22 realtime but I don't have it. It stopped but it is now back.

23 THE COURT: Let me rephrase the question anyway.

24 So, Alexander Capital entered into an agreement where  
25 it said that it could provide a firm commitment underwriting as

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Amato - Direct

1 the exclusive underwriter for this deal, for what eventually  
2 became Inpellis going forward. Why couldn't a fact-finder  
3 conclude, taking everything hypothetically most favorably to  
4 the plaintiff, that that was, even if it was not a willfully  
5 wrong act, that it was a reckless one?

6 MS. COLE: I think it's a different question than what  
7 Mr. Rand was arguing. He was arguing --

8 THE COURT: Yes, it is, and I --

9 MS. COLE: OK.

10 THE COURT: And you have convinced me --

11 MS. COLE: OK.

12 THE COURT: -- that he does not have a direct claim  
13 against Mr. Amato for reckless fraud. But then you were saying  
14 that, under paragraph 7, where he alleges there Mr. Amato's and  
15 others' liability and a matter of, if you will Delaware law, I  
16 hate to use the term "respondeat superior" but it is that kind  
17 of concept, and plaintiff's counsel then said, well, what we  
18 are really saying -- he recast his allegation -- what we are  
19 really saying is that even if Alexander Capital was not  
20 willfully, intentionally engaged in fraud -- although they  
21 think it was -- they also have the alternative that it was  
22 acting recklessly and that the failure of the firm and its  
23 supervisors -- and to use a real legal term: Honchos -- to not  
24 catch the fact that they had no ability to offer a firm  
25 commitment as the sole and exclusive underwriter was at least

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1 reckless. That's my question.

2 MS. COLE: So, your Honor, I guess I have a few  
3 responses to that. One is I'm not aware of any authority that,  
4 at trial, that the plaintiff can recast their complaint to  
5 include a claim that was not pled. This is a case about  
6 intentional fraud, fraudulent inducement. It is not a case  
7 that alleges negligent representation.

8 THE COURT: No, I'm not talking about negligence and  
9 maybe I should make clear what I mean by reckless and what I  
10 assume plaintiff means, which is a knowing turning away of what  
11 a reasonable person in their situation would have known. So,  
12 it is a classic part of a fraud package, if you will.

13 MS. COLE: And is he alleging that Mr. Amato knowingly  
14 turned away?

15 THE COURT: No. No.

16 MS. COLE: OK.

17 THE COURT: Well, he may be alleging that too but not  
18 as the direct claim. He is alleging, as I understood, that the  
19 firm knowingly turned away and that that shown, among other  
20 things, by the fact that people in positions at least nominally  
21 in positions of supervision, did not exercise that supervision.  
22 Something like that.

23 MS. COLE: So I understand that you are reasonably  
24 inferring things in favor of the plaintiff's complaint;  
25 however --

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1 THE COURT: Only for purposes of this argument. As  
2 the fact-finder of course I may disagree factually that there  
3 is any evidence of any of this. That's another thing.

4 MS. COLE: That would be my next point. I understood  
5 what he was trying to argue was that the firm was liable for  
6 the conduct of its managing partner so I would say, one, there  
7 is not any evidence, competent evidence that Mr. Amato was a  
8 managing partner; and two, that there is not going to be any  
9 evidence that anyone knowingly looked the other way.

10 THE COURT: What do you say to the point which  
11 Mr. Amato says is totally wrong but, nevertheless, the  
12 representation was made to -- I can't remember whether it was  
13 FINRA or the SEC -- I think it was FINRA -- that he was in  
14 active control.

15 MS. COLE: So that representation was made after this  
16 engagement agreement was entered into. There is no evidence  
17 that Mr. Amato ever held himself out to anyone at Inpellis as  
18 the managing director or partner and I do believe that some of  
19 the case authority that we did cite in our summary judgment  
20 briefing was that in order to be held liable as a partner the  
21 individual had to hold themselves out to the injured party as  
22 being a partner and that has not been established or alleged in  
23 the complaint.

24 THE COURT: Well, now that's interesting. I am  
25 surprised. I mean, my main knowledge of partnership law



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1 relates to that weird entity called a law partnership, but my  
2 recollection is that if the law firm is liable all the partners  
3 are liable regardless of whether the public knew they were  
4 partners or they were secret partners.

5 Do you think the law is different in --

6 MS. COLE: I believe we cited law that was different.

7 THE COURT: Why would it be different? It is not a  
8 function of what the public knew, it is a function of, well,  
9 either you are a partner or you are not a partner and you  
10 assume the responsibilities of a partnership.

11 MS. COLE: I can't speak to why the law would be  
12 different, I am speaking based on my recollection.

13 THE COURT: Well, who knows what those Delaware judges  
14 will say.

15 All right. I think we have gone as far as we can for  
16 today's limited purposes so let's get the -- does anyone want a  
17 break? Otherwise we will go straight to 5:00.

18 MR. RAND: Sure. A break would be nice.

19 THE COURT: We will take a 5-minute break and we will  
20 go on until 5:00.

21 (Recess)

22 THE COURT: Let's get the witness back on the stand.

23 Counsel?

24 BY MR. RAND:

25 Q. Mr. Amato, did Alexander have any procedures for alerting

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1 their employees as to whether Alexander Capital had the right  
2 to perform firm commitment offerings?

3 A. When was this?

4 Q. Isn't it true that Alexander Capital did not have any  
5 procedures at any time to alert its employees as to whether  
6 Alexander Capital had the right to perform firm commitment  
7 offers?

8 A. I am uncertain at the time. I wasn't in that role.

9 Q. Do you have any knowledge of any procedures at any time  
10 under which Alexander Capital required its employees to have  
11 knowledge as to whether Alexander Capital was able to perform  
12 firm commitment offerings?

13 A. Currently, after all of this that took place going back to  
14 '15 and '16 and putting in a CMA and getting licensing, I guess  
15 the banking and capital markets department know our  
16 capabilities.

17 Q. When did that change occur?

18 A. I couldn't really tell you exactly but I know today they're  
19 aware of the licensing and there are -- there is more -- they  
20 have more active discussions with compliance and the CFO.

21 Q. Is that in reaction to this lawsuit?

22 A. No. It is just reaction into the awareness from the FINRA  
23 letter going back to '15.

24 Q. And prior to the FINRA letter, were there any policies or  
25 procedures for alerting employees as to the ability of

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1 Alexander Capital to perform firm commitment offerings?

2 A. I'm unaware at that time.

3 Q. Do you believe there is an obligation of a broker-dealer to  
4 tell its employees whether it has the right or not to perform  
5 firm commitment offerings?

6 A. I don't believe so.

7 Q. You don't believe there is any duty to, for a broker-dealer  
8 to inform its employees?

9 A. To the independent contractor as in reps? No, I don't  
10 believe so.

11 Q. Do you believe that employees of a broker-dealer have a  
12 duty to determine if the broker-dealer has a right to perform  
13 firm commitment offerings before it enters into agreements  
14 representing it will perform firm commitment offerings?

15 A. The employees? I'm sorry. Repeat that.

16 Q. Do you believe the employees have a duty to inform  
17 themselves as to whether Alexander Capital had the right to --

18 MS. COLE: Objection. Relevance.

19 MR. RAND: I didn't finish the question.

20 THE COURT: Go ahead. Finish the question.

21 BY MR. RAND:

22 Q. Sorry.

23 In your opinion, do employees of Alexander Capital, at  
24 all times, have a duty to determine if Alexander Capital has  
25 the authorization by FINRA to perform firm commitment offerings

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Amato - Direct

1 prior to entering into agreements on behalf of Alexander  
2 Capital agreeing to perform firm commitment offerings?

3 MS. COLE: Same objection.

4 THE COURT: The objection is sustained.

5 Q. If Alexander Capital enters into -- well, did Alexander  
6 Capital have a duty to disclose to Inpellis?

7 THE COURT: See, I have, among many other problems I  
8 have with this question. The question of whether a firm like  
9 Alexander Capital has a duty to do X, Y, or Z, is a question of  
10 law and therefore not a question for any witness but only for  
11 the Court. Furthermore, even if that were not true, this  
12 witness was not at the time, according to at least his prior  
13 testimony, in a position to form that kind of opinion or make  
14 that kind of decision and, therefore, whatever may be his  
15 ability as a matter of law now, I don't see the relevance.

16 Now I could go on. It is also a compound question, it  
17 is also vague, but perhaps you might want to go on to a  
18 different question.

19 MR. RAND: Yes. I will move on, your Honor.

20 THE COURT: All right.

21 BY MR. RAND:

22 Q. I would like to show you Plaintiff's Exhibit 55 in  
23 evidence. Mr. Amato, have you seen what has been marked as  
24 Plaintiff's Exhibit 55 before?

25 A. I am uncertain. I don't believe so looking at it now.

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1 Q. Is it a letter to the Department of Enforcement, Financial  
2 Industry Regulatory Authority, regarding Alexander Capital?

3 A. It looks like an AWC, it states.

4 Q. Yes. Is it a letter of acceptance, waiver, and consent?

5 A. Yes, it is.

6 Q. And I would like to point you to paragraph 1 on page 4 of  
7 10 at the top.

8 A. I'm sorry. Page 1?

9 Q. Well, page 3 at the bottom, if you are looking at the pages  
10 at the bottom, and then paragraph 1 where it says: 2016 net  
11 capital violations.

12 A. Yes.

13 Q. Do you see in the second paragraph down it states: First,  
14 between January 2016 and June 2016, Alexander Capital  
15 participated in 16 firm commitment offerings.

16 Is that a true statement?

17 A. I would assume so. I'm not certain exactly how many but if  
18 it is coming from FINRA and it is saying there were 16 it is  
19 probably accurate.

20 Q. And was Alexander Capital permitted to do firm commitment  
21 offerings during that period?

22 A. At the time we believed we were allowed to do these such  
23 deals.

24 Q. And did FINRA give you an approval at that time?

25 MS. COLE: At what time?

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1 MR. RAND: During the period from January 2016 to June  
2 2016.

3 A. Like I stated, I believed that we had the right to do it at  
4 the time going into this and they were questioning net cap, not  
5 the ability.

6 Q. And do you know what your net capital was in 2016?

7 A. I do not. I don't work with that. That would be the chief  
8 financial officer Thomas Sullivan, who I believe's name is all  
9 over this.

10 Q. When you work with clients do they ever ask you what your  
11 net capital is?

12 A. I have never had that to me, no.

13 Q. Have you ever performed a firm commitment offering?

14 A. Excuse me?

15 Q. Have you ever been in charge of a firm commitment offering?

16 A. Like I stated earlier, I have nothing to do with the  
17 banking department whatsoever, so no.

18 Q. What is your job at Alexander Capital?

19 A. Today?

20 Q. During 2016.

21 A. At what point in '16?

22 Q. At all points. Can you say how it changed?

23 A. Yes, it did change, I believe. I believe I took -- it is  
24 probably after this because it is saying June of 16, I'm not  
25 sure if it was July or around that time, I did at that time

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1 step into the CEO position. That was when Mr. Feinman resigned  
2 from the position, I stepped into the role. I am not exactly  
3 sure on the exact date but I believe it was sometime after this  
4 in '16.

5 Q. So you were CEO of Alexander Capital in 2016 and you are  
6 stating today that have you no knowledge of '16 firm commitment  
7 offers performed by Alexander during 2016? Is that correct?

8 MS. COLE: Objection. Misstates the testimony.

9 THE COURT: Well --

10 MS. COLE: If I may, your Honor, he testified he  
11 became CEO after the time frame referenced in the AWC.

12 THE COURT: I see.

13 MS. COLE: That is dealing expressly with these  
14 alleged 16 firm commitment offerings.

15 THE COURT: Well, I think given that representation  
16 why don't you put a new question.

17 BY MR. RAND:

18 Q. Were you the CEO between January 2016 and June 2016?

19 A. Like I stated earlier, I didn't believe so. I believe when  
20 Mr. Feinman stepped down I think it was June or July of '16 but  
21 I'm not exactly sure what that date was.

22 Q. As CEO did you know anything about the previous business of  
23 Alexander?

24 A. I was playing catch-up at that point just coming into the  
25 role, my first time in the position, but I became aware of this

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1 I am sure at the time but I don't remember the details outside  
2 of what you just handed me now.

3 Q. As CEO were you aware of any firm commitment offerings that  
4 were done while you were CEO?

5 A. I'm sorry. While I was CEO?

6 MS. COLE: Objection. Vague.

7 THE COURT: No. Overruled.

8 THE WITNESS: Can you repeat the question, please?

9 THE COURT: Yes.

10 Since you have become CEO are you aware of any firm  
11 commitment offerings that have been done by the firm?

12 THE WITNESS: I am uncertain if we did any firm  
13 commitments, I believe we may have but I'm not sure of the  
14 dates, but I would have been aware at that point at some point  
15 in the process at the end before they went public. For net  
16 capital purposes I would have been informed but, again, it is  
17 not an area I handle, would I have gotten it second hand.

18 THE COURT: Wait. I guess this is getting at what  
19 plaintiff's counsel is getting at.

20 When you say it is not an area you handle --

21 THE WITNESS: Correct.

22 THE COURT: -- that's one thing if you are a  
23 registered rep. You are CEO, yes?

24 THE WITNESS: Yes.

25 THE COURT: Last I checked, the ultimate



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1 responsibility for the day-to-day management of the firm rests  
2 in the chief executive officer, does it not?

3 THE WITNESS: No, that would be the chief compliance  
4 officer at the broker-dealer level.

5 THE COURT: Oh. Is that right? So just a title?

6 THE WITNESS: Pretty much. Year-end I go over a  
7 year-end review. That's the only requirement of the CEO, that  
8 the chief compliance officer says what took place, explaining  
9 what they did and their justification. I can't even fire the  
10 chief compliance officer on a one-off. They have control.

11 THE COURT: So you are the luckiest guy in the world.  
12 You have the title of CEO and you don't have to do anything.

13 THE WITNESS: Well --

14 THE COURT: That was said facetiously, for the record.  
15 Does Alexander Capital have bylaws?

16 THE WITNESS: We have WSPs; Written Advisory  
17 Procedures.

18 THE COURT: This will show my ignorance; are you  
19 incorporated in Delaware?

20 THE WITNESS: Yes, the firm is, I believe.

21 THE COURT: Pursuant to Delaware law you have bylaws  
22 or some equivalent thereto, equivalent thereof, that specifies  
23 the responsibilities of various officers; yes?

24 THE WITNESS: Not to my understanding for the  
25 broker-dealer. I could be wrong but I don't believe that's --

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1 it is within -- it would be within the corporate structure of  
2 Alexander, not in Delaware, that I am aware of.

3 THE COURT: Let me -- maybe I should just ask counsel.  
4 Does Alexander have -- we will start with are you incorporated  
5 in Delaware?

6 MR. WARD: That I believe is true, but as a  
7 FINRA-regulated firm it's governed by its written supervisory  
8 procedures and they have clear lines of delineations of  
9 compliance and supervisory duties.

10 THE COURT: No, I want to get to that because that is  
11 very interesting but before I get to that, if you are  
12 incorporated in Delaware I am willing to conjecture that there  
13 are probably somewhere a set of bylaws that you had to submit  
14 in order to obtain incorporation.

15 MR. WARD: Nobody can testify to that, it is not on  
16 the record, but the --

17 THE COURT: Well, no, I'm not asking the witness, I am  
18 just saying -- well, maybe this is something that someone can  
19 provide me with by tomorrow; one, if there are a set of bylaws  
20 I would like to see them because I am almost certain, as with  
21 every other corporation in the United States, a company is  
22 governed -- a company in a business that is subject to federal  
23 regulation is subject to both state laws and federal laws.

24 MR. WARD: And to be clear, they are a partnership  
25 rather than incorporated.

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1 THE COURT: Ah. So they're a partnership. OK. So I  
2 guess what led me astray then is -- OK, they're a limited  
3 partnership under Delaware law. So they may not -- even then I  
4 think Delaware requires some partnership agreement or something  
5 like that. I don't think you can file in Delaware or any other  
6 state in the nation for -- to be incorporated or a partnership  
7 subject to the law of the state without presenting some  
8 indication of how your entity is governed.

9 MR. WARD: There have certainly been certifications  
10 which have been in dispute in this case about the status and  
11 the partnership.

12 THE COURT: That's true too. But anyway, so I would  
13 like to see whatever it is and that was filed in Delaware.

14 Secondly, with respect to the things you were  
15 referring to that are approved by FINRA, what are they called  
16 again?

17 MR. WARD: There is the compliance structure and  
18 supervisory structure and they are designated principles so  
19 there is a clear line of who is supervising whom.

20 THE COURT: OK, so I would like to see that as well.

21 And is it your understanding that the CEO has no  
22 supervisory authority?

23 MR. WARD: Yes, your Honor, that is my understanding;  
24 that it goes through the compliance structure and that that  
25 is -- it is a compliance and supervisory structure.

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1 THE COURT: So instead of calling it CEO why don't we  
2 just call it gopher?

3 MR. WARD: They do have -- I mean, there are  
4 corporate, in terms of running the corporation but in terms of  
5 running the entity, they have those abilities to enter into  
6 agreements and that type of thing but in terms of supervising  
7 its governed by FINRA.

8 THE COURT: I will be very anxious to see that so just  
9 get it to me, bring it with you tomorrow morning, I will take a  
10 look.

11 OK. So, I think we are ready for another question.

12 MR. WRIGHT: Your Honor, may I ask a clarifying  
13 question? The WSPs likely went through several iterations  
14 during that time period --

15 THE COURT: I'm interested in right now.

16 MR. WRIGHT: In right now? Absolutely.

17 THE COURT: Yes.

18 MS. COLE: So you want the current version.

19 THE COURT: I want the current version because I want  
20 to find out whether -- how much --

21 Do you make a salary?

22 THE WITNESS: I do.

23 THE COURT: How much?

24 THE WITNESS: Well, that's interesting. I am listed  
25 for 250 but years like this year I have only taken \$50,000.

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1 THE COURT: OK.

2 THE WITNESS: It varies. And production is in there  
3 as well.

4 THE COURT: I would figure to be figurehead CEO and be  
5 paid 50,000 I would understand that. 250 might raise a  
6 different issue.

7 THE WITNESS: But my commissions are in there as well.

8 THE COURT: Clearly the Court is getting out of  
9 control here. Let's go on with another question.

10 BY MR. RAND:

11 Q. I would like to mark for identification Plaintiff's Exhibit  
12 33. Do you recognize this document?

13 A. I do not. Let me look through it. I see it is something  
14 with the SEC.

15 Q. It's labeled Order Instituting Administrative Proceedings  
16 Pursuant to Section 15B of the Securities and Exchange Act of  
17 1934 Making Findings Imposing Remedial Sanctions, dated June  
18 29, 2018.

19 A. OK.

20 Q. Have you seen this document?

21 A. I don't recall it. It is possible I have seen it over the  
22 years.

23 Q. What was your position at Alexander on June 29, 2018?

24 A. 2018 I believe I was listed, I am still the CEO at that  
25 time.

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1 Q. And looking at page 2, paragraph 3.

2 A. OK.

3 Q. It says: From 2012 through 2014, Alexander Capital failed,  
4 reasonably, to implement certain policies and procedures and  
5 permitted a lax compliance environment in which these RRs were  
6 not reasonably monitored or disciplined. Procedures were not  
7 followed and indications of potential misconduct were not acted  
8 upon by the supervisors of the three RRs, supervisor A, and  
9 supervisor B.

10 Is that a true statement?

11 A. Those were the charges. That wasn't the end result.

12 Q. I believe these are findings.

13 A. Findings, correct.

14 Q. Is it true that that is a finding of the SEC?

15 A. I believe this is where it started. The settlement was  
16 different from the findings.

17 MR. RAND: I would move into evidence Plaintiff's  
18 Exhibit P 33.

19 MS. COLE: Objection; relevance, improper 404(b)  
20 evidence.

21 THE COURT: Yes. So, as with my prior ruling, I will  
22 accept it in evidence for its limited relevance to other issues  
23 but not for the 404(b) purpose, although this is without  
24 prejudice to whether or not I will receive it for 404(b)  
25 purposes, we can argue that later, but for now it is received

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1 only for more limited purposes exemplified by the questions put  
2 to the witness.

3 MS. COLE: Thank you, your Honor.

4 MR. RAND: Thank you, your Honor.

5 (Plaintiff's Exhibit 33 received in evidence)

6 BY MR. RAND:

7 Q. These are Mr. Amato's deposition designations.

8 Mr. Amato, did you give your deposition in this case?

9 A. Yes, I did.

10 Q. Did you give it on September 30th, 2021?

11 A. I believe so.

12 Q. And I'm going to read from your deposition transcript and  
13 I'm going to ask you afterwards if you believe the statement is  
14 true and accurate.

15 THE COURT: Actually, I will allow you to do that, but  
16 when I made my rulings about use of deposition transcripts that  
17 were being offered for -- and I said if you are calling so and  
18 so as a witness they're not coming into evidence except for  
19 impeachment, but I did not focus on the fact that that ruling  
20 does not apply to a party, and a party's statements are  
21 admissible independently as the statement of a party adversary.  
22 Therefore, while you are welcome to read all of this, I will  
23 now receive the deposition of Mr. Amato's, I will receive your  
24 designations in evidence. So, I can read them all by myself is  
25 my point but you are welcome to inquire about any of them you

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Amato - Direct

1 want to inquire about.

2 MR. RAND: I would not like to belabor the Court but I  
3 would like to go through a few of them.

4 THE COURT: Sure.

5 MR. RAND:

6 "Q All right. Is it your understanding from 2014 to 2015 that  
7 Alexander Capital's restrictive agreement allowed it to be the  
8 sole running manager of a firm commitment offering?

9 "A No.

10 "Q It did not allow that?

11 "A I don't believe we can do firm commitment underwriting.

12 "Q OK. So, is it your testimony then to be clear here, it was  
13 your understanding from -- it is your understanding that from  
14 2014 and 2016, Alexander Capital was not allowed to conduct  
15 firm commitment offerings as an underwriter; is that correct?

16 "A As lead underwriter?

17 "Q Right."

18 THE COURT: By the way, a further reason to receive  
19 this, which I did not know again when I made my earlier ruling,  
20 he was being deposed as the 30(b)(6) witness?

21 MR. RAND: Yes.

22 THE COURT: So his statements are not only binding on  
23 him as a statement of a party adversary, but they're binding on  
24 the company as well.

25 MS. COLE: Your Honor, I would just note that the



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1 30(b)(6) topic was extremely narrow, it was only for someone  
2 who could testify about Alexander's financial capability and  
3 Mr. Schlichtmann, who conducted the deposition, he would  
4 identify when he was asking a question for the 30(b)(6) or  
5 whether he was asking it for Mr. --

6 THE COURT: So it is coming in for the reasons I  
7 previously said in any event but I will restrict my further  
8 ruling to where he was clearly testifying as the 30(b)(6).

9 MS. COLE: Thank you.

10 BY MR. RAND:

11 Q. Was the transcript I just read true and accurate?

12 A. So, looking at it now you are talking about '14, '15, and  
13 '16 so it's accurate but not telling the whole story because in  
14 '15 we learned that we couldn't do firm commitment  
15 underwriting. In '14 we were under the belief we could to a  
16 certain point and we participated in deals up until '16 in the  
17 syndicate level. So, it's a tricky question because you are  
18 asking multiple years but it was different knowledge that I had  
19 at that time so it is not as cut and dry as a yes or no answer.

20 Q. Did you ever get approval from FINRA to do firm commitment  
21 offerings during 2014, 2015, or 2016?

22 A. No, but we understood in 2015 that we couldn't do them. I  
23 was under the belief that we could.

24 Q. I just want a yes or no answer.

25 A. That's the problem, I can't give a yes or no answer to that

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Amato - Direct

1 question.

2 Q. Why?

3 A. Because I don't believe it is a fair question.

4 THE COURT: Well, I think you did give an answer. The  
5 first word out of your answer was no, and then you volunteered  
6 why you understood as opposed to what you could -- whether or  
7 not -- the question was did you ever get approval from FINRA to  
8 do firm commitment offerings during 2014, 2015, or 2016. Your  
9 answer was, no, but we understood..., and then you went on.

10 THE WITNESS: That's correct.

11 THE COURT: So I think you did answer the question.

12 So, put another question, counsel.

13 BY MR. RAND:

14 Q. Further in the transcript it reads:

15 "Q OK, do you remember seeing this continuing membership  
16 application at the time it was made on June 3 of 2015?

17 "A No.

18 "Q But you were made aware that an application was being made?

19 "A Correct.

20 "Q And do you know what, who was making the application?

21 "A I believe it was our attorney at the time.

22 "Q And was -- were you aware that, of the firm that was doing  
23 it was the Sichenzia Ross firm?

24 "A Correct."

25 Were those true statements that you made?

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Amato - Direct

1 A. I believe Sichenzia Ross was doing the 2015 app, I believe  
2 that to be correct.

3 Q. Next question and answer:

4 "Q Was it your understanding, and now I am asking you  
5 personally, yesterday Mr. Guidicipietro" --

6 THE COURT: Sorry. Where are you?

7 MR. RAND: Page 94.

8 THE WITNESS: Page what?

9 THE COURT: 94.

10 MR. RAND: Sorry. I should have said that.

11 THE WITNESS: OK. I'm sorry.

12 MR. RAND:

13 "Q Was it your understanding, and now I am asking personally,  
14 yesterday Mr. Guidicipietro said that Alexander Capital- -- he  
15 used the phrase -- was a nickel broker?

16 "A Nickel broker-dealer.

17 "Q That's right. And are you familiar with the nickel term,  
18 colloquial expression nickel broker-dealer?

19 "A I am.

20 "Q What does it mean? What was your answer as of 2014 to  
21 2015?

22 "A It is just a qualification level you need to keep on as an  
23 excess net capital.

24 "Q OK. And as a nickel broker-dealer, was it your  
25 understanding that a nickel broker-dealer was not authorized to

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Amato - Direct

1 commit a firm commitment offering?

2 "A Correct. You cannot."

3 Was that testimony accurate?

4 A. Yes. This is what I had known when we went through this in  
5 2021 or '22; yes.

6 Q. What does it mean to be a nickel broker-dealer?

7 A. It is a level of net capital you have to have in excess.

8 Q. It doesn't mean you only need \$5,000 of net capital?

9 A. Yes. In excess.

10 Q. And is that the lowest level of net capital permitted for a  
11 broker-dealer?

12 A. Well, that's just a term. A nickel broker-dealer can have  
13 10 million in the fund but I don't know -- the nickel BD, I am  
14 uncertain if that is the lowest level of BD. I don't know. I  
15 know we were a nickel BD at the time.

16 Q. Going on to page 105.

17 THE COURT: I wonder whether a nickel broker dealing  
18 in penny stocks has escaped inflation.

19 MR. RAND: I have never understood why a nickel goes  
20 to 5,000 but who knows.

21 MR. RAND: (reading)

22 "Q All right. Are you aware, now I am asking you personally,  
23 are you aware of any steps that the company took to inform  
24 people who worked at Alexander Capital and whose jobs would  
25 have them participate in potential underwriting that Alexander

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Amato - Direct

1 Capital was participating in, were there any steps to inform  
2 them of the FINRA restrictions we have just gone over?

3 "A I don't recall if we had, no.

4 "Q Did you take any steps?

5 "A No, I don't recall.

6 "Q Did you -- are you aware -- does Mr. Guidici Pietro take any  
7 steps?

8 "A You would have to ask him.

9 "Q All right. You are not aware of any?

10 "A I am not aware.

11 "Q How about Mr. Feinman, CEO, are you aware of him taking any  
12 steps?

13 "A I don't know.

14 "Q Are you aware of Mr. Stack taking any steps?

15 "A I don't know who informed. I do not know.

16 "Q OK. I am asking specifically as to these people. So you  
17 don't know whether Mr. Feinman did, correct?

18 "A Correct.

19 "Q You don't know whether Mr. Stack did, correct?

20 "A Correct.

21 "Q You don't know if Mr. Gazdak did, correct?

22 "A Correct.

23 "Q You don't know if Mr. Carlin did, correct?

24 "A Correct."

25 On page 107:

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1 "Q Yes. Based on your understanding of -- let me ask you this  
2 way. Were you aware of any practices or procedures in place at  
3 Alexander Capital in 2015 that would have required the people,  
4 required that people involved in any offering that Alexander  
5 Capital intended to participate in to be made aware of these  
6 restrictions we just went over?

7 "A I am uncertain.

8 "Q You are not aware of any?

9 "A I am uncertain.

10 "Q OK. When you say "uncertain" does that mean you are aware  
11 or not aware of any such practices or procedures?

12 "A I am unaware. I don't know."

13 Going on to page 119:

14 "Q Great. All right. Now I am asking you, Mr. Amato, in your  
15 position as the designee for Alexander Capital, what was  
16 Alexander Capital's understanding after receipt of the June 11,  
17 2015 FINRA letter that we have previously gone over in which it  
18 imposed certain restrictions that we have gone over regarding  
19 whether or not Alexander Capital could be listed as the  
20 underwriter who intended to do a -- the underwriting on a firm  
21 commitment basis as to whether or not Alexander Capital could  
22 be listed as the underwriter who intended to do an offering on  
23 a firm commitment basis after receipt of that Letter?

24 "A It is my understanding Alexander Capital don't do the  
25 filing.

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Amato - Direct

1 "Q Don't do the filing?

2 "A We don't file it.

3 "Q OK. Could they be listed in any filing? Alexander  
4 Capital, what was Alexander Capital's understanding as to  
5 whether it could be listed in any such filing as the  
6 underwriter who intended to underwrite the offering on a firm  
7 commitment basis? Could it be listed or not be listed?

8 "A We don't file. The issuer does the filing and listed what  
9 they choose to."

10 Moving on to page 198:

11 "Q Not a problem. During the time that you were CEO between  
12 2013 and 2015, was it appropriate for an employee of Alexander  
13 Capital, who is dealing with a potential customer of the firm  
14 who is seeking its services as an underwriter, was it  
15 appropriate for the Alexander Capital person interacting with  
16 that potential client to tell them that Alexander Capital could  
17 act as the underwriter on a firm commitment basis?

18 "MR. WARD: Objection; vague.

19 "Q Was that appropriate or inappropriate?

20 "MR. WARD: Same objection.

21 "Q Did you understand the question?

22 "A I do.

23 "Q Can you answer it?

24 "A I don't believe we had to say or not say. I don't believe  
25 we had to discuss it."

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Amato - Direct

1 Is that a true statement?

2 A. No. It was a mistake because I wasn't the CEO from 2013 to  
3 2015. I was for like two or three weeks, if that's the  
4 question. I still don't believe it would be a stated thing  
5 that comes from us -- from me. That wasn't my department, I  
6 wasn't handling it, because I was nothing to do with banking.

7 Q. So the statements you made in this transcript that I just  
8 read are not correct?

9 A. I didn't say that. I says I don't believe that -- I don't  
10 believe we would have to say it or not. I don't think it was  
11 for me to discuss. It is exactly what I said.

12 Q. You are agreeing with the transcript?

13 A. No, no. That was my answer.

14 Q. I will just ask you a simple question. Did you tell the  
15 truth in the answers to the questions that I just --

16 THE COURT: No. What he is saying, as I understand it  
17 and the witness will correct me if I am wrong, is the question  
18 misstated the years that he was CEO --

19 THE WITNESS: Correct.

20 THE COURT: -- but in answer to the substance of the  
21 question of whether it was appropriate for the Alexander  
22 Capital person interacting with a potential client to tell them  
23 if Alexander could act as the underwriter on a firm commitment  
24 basis, the answer he gave is the answer he still would give,  
25 namely, I don't believe we had to say or not say.



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Amato - Direct

1 Do I have that right?

2 THE WITNESS: Yes. I was saying that as me answering  
3 that but I think I misread his question.

4 THE COURT: Now, the problem with this particular  
5 question is that an objection was raised on grounds of  
6 vagueness, an appropriate action as to form. For reasons I  
7 don't understand defense counsel did not, in their objections  
8 to this transcript which had to be in the margins, indicate  
9 that they were renewing their objection as to form.  
10 Nevertheless, I think it is -- the question is so hopelessly  
11 vague that the Court *sua sponte* will sustain that objection and  
12 strike the question and answer, and this is on page 198, line  
13 23, through page 199, line 18.

14 That, of course, doesn't preclude plaintiff's counsel  
15 from putting a question directly to the witness on that  
16 subject. The reason it is vague, just so that the record is  
17 complete, is "appropriate" is not a term that has a clear  
18 meaning in any context.

19 BY MR. RAND:

20 Q. Did the procedures of Alexander Capital, at any time during  
21 the period from 2013 to 2015, require an employee of Alexander  
22 Capital to tell an Alexander Capital client that they could not  
23 do a firm commitment underwriting when they were agreeing to  
24 perform a firm commitment underwriting?

25 A. Can you repeat that?

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Amato - Direct

1 Q. Can you read it back?

2 (Record read)

3 THE COURT: I will read it: Did the procedures of  
4 Alexander Capital, at any time during the period from 2013 to  
5 2015, require an employee of Alexander Capital to tell an  
6 Alexander Capital client that they could not do a firm  
7 commitment underwriting when they were agreeing to perform a  
8 firm commitment underwriting?

9 MS. COLE: I would object to the question, your Honor.

10 THE COURT: You are a little slow but the objection is  
11 sustained.

12 MS. COLE: Thank you.

13 THE COURT: I will ask a couple questions so we can  
14 move this on because we only have five more minutes.

15 As I understand your prior testimony, your  
16 understanding was that while you now recognize that Alexander  
17 could not do firm commitment underwritings in the situation  
18 presented by Inpellis, at the time your understanding is that  
19 that was not clear to the people at Alexander?

20 THE WITNESS: Yes. Yes, I don't believe it was.

21 THE COURT: That's what I understood your testimony to  
22 be.

23 THE WITNESS: Thank you, your Honor.

24 MR. RAND: I have no further questions at this time.

25 THE COURT: Anything else for this witness?

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Amato - Cross

1 MR. RAND: No, your Honor; not from the plaintiff.

2 THE COURT: No.

3 MS. COLE: We will have some questions for him but we  
4 can wait to start them until tomorrow.

5 THE COURT: Well, how many questions do you have?

6 MS. COLE: Not very many.

7 THE COURT: Then why don't we do them now. You are  
8 paying the price for my tardiness.

9 CROSS-EXAMINATION

10 BY MS. COLE:

11 Q. I think we have established --

12 THE COURT: I will tell you what. I just realized  
13 there are some questions I wanted to put to the witness so we  
14 will let you go over until tomorrow since he is going to be  
15 here anyway, but a question I wanted to ask earlier and I will  
16 ask now: Where were you born?

17 THE WITNESS: Brooklyn, New York.

18 THE COURT: I detect a little hint of that.

19 Where did you go to school?

20 THE WITNESS: I ended up going to Staten Island,  
21 mostly.

22 THE COURT: Before you went to work for Alexander  
23 Capital, what did you do?

24 THE WITNESS: I was in, marked for a starter with Dean  
25 Witter, which was then merged with Morgan Stanley, then from

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Amato - Cross

1 there my team was bought out, we went to Prudential Securities,  
2 then I believe we went independent at that point with Raymond  
3 James. Then another firm that was clearing Raymond James at  
4 that point, and then eventually another firm Legend where I met  
5 Rocco, we became associates and partners at that point, and  
6 then to Alexander.

7 THE COURT: OK. I think we will end for today. We  
8 will start, as I mentioned, 10:00 tomorrow but we will probably  
9 go to 5:00.

10 MR. RAND: Your Honor?

11 THE COURT: Yes.

12 MR. RAND: Just housekeeping. We still have some  
13 further expense items where we need to bring witnesses by  
14 video.

15 THE COURT: Yes, just as we did today.

16 MR. RAND: I think we are trying to schedule them, I'm  
17 not sure what is happening, but hopefully they'll be scheduled  
18 for 10:00 tomorrow.

19 THE COURT: OK.

20 LAW CLERK: 10:00 a.m. tomorrow?

21 MR. RAND: Yes. We are starting at 10:00, aren't we?  
22 That will be good, we can start before the day starts.

23 LAW CLERK: I will send you all a Teams invitation.

24 THE COURT: Which you ought to accept, so. All right,  
25 we will see you tomorrow.

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Amato - Cross

1 MR. RAND: Another quick question, housekeeping.

2 THE COURT: Sure.

3 MR. RAND: Can we leave our stuff here?

4 THE COURT: Yes.

5 MR. RAND: Thank you, your Honor.

6 THE COURT: We are only going to be able to go to 4:15  
7 tomorrow, I was just reminded of another matter.

8 (Adjourned to June 28, 2023 at 10:00 a.m.)

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